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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 319

HENRY R. PROKNEY, RICHARD L. KENNY and HAROLD WHEELER,
Petitioners,

vs.

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND APPENDIX

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.....

HENRY R. PICKETT, RICHARD L. KIRBY and HAROLD WIRSING,
Petitioners,
vs.
STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Henry R. Pickett, Richard L. Kirby and Harold Wirsing, the Petitioners herein, pray that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of the State of Michigan, affirming the conviction of the petitioners by the Circuit Court for Genesee County, Michigan.

(References to printed record in State Court are marked R.)

A.

REFERENCE TO OFFICIAL REPORTS:

Review is sought of *People of the State of Michigan vs. Henry R. Pickett, et al.*, 339 Mich. 294, 63 N. W. (2d) 681.

The case was previously appealed by the People in the combined cases of *People vs. Birch* and *People vs. Pickett, et al.*, 329 Mich. 38, 44 N. W. (2d) 859.

B.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

(i) Review is sought of the judgment by the Supreme Court of the State of Michigan, affirming a judgment of conviction by the Circuit Court for the County of Genesee. The opinion of the Supreme Court of Michigan was rendered April 5, 1954.

(ii) A motion for rehearing was timely filed and denied by the Supreme Court of Michigan, June 7, 1954. (Petitioners were admitted to bail, pursuant to an order of Mr. Justice Stanley Reed, Associate Justice of the Supreme Court of the United States, July 1, 1954).

(iii) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
* * *

"(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * *."

C.

QUESTIONS TO BE PRESENTED FOR REVIEW

1. Does the Michigan one-man judge-grand jury statute violate the constitutional requirements of due process requiring separation of powers and functions as between executive and judicial: Fourteenth Amendment, *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682?

2. Did the judge-grand juror proceeding function in accordance with due process in the case at bar; and was the doctrine of separation of powers violated in view of such undisputed practices as: questioning witnesses repeatedly at odd hours and places; questioning by relay,

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including Judge, Prosecutor and Special Investigator; questioning wives of key witnesses; questioning witnesses without swearing them; conducting sessions of Grand Jury by the Special Investigator alone; and holding special jury session for the purpose of granting immunity, the day before the preliminary examination, and long after warrant was issued?

3. May the testimony of the Grand Juror or the stenographic transcript be used to show the violation of the propriety and due process of a claimed judicial investigation (whether viewed as a Grand Jury or otherwise)?

4. Where the prosecution on trial has access to all testimony previously given by People's witnesses in innumerable appearances by them before the Grand Juror, is it denial of due process, and right to compulsory process, to deny defendants the right to examine and use such testimony for impeachment, possible contradictions or cross-examination? Fifth, Sixth and Fourteenth Amendments.

5. Does the Michigan Statute (28.773 *Callaghan's Mich. Stat. Anno.*) permitting the Supreme Court of Michigan to define "common law offenses" by retroactive judicial decision, constitute an unconstitutional delegation of legislative powers to the judiciary; and fail to define with sufficient clarity what conduct is illegal and punishable? Fourteenth Amendment.

6. The Legislature of the State of Michigan, having enacted statutes for the punishment of gambling as high misdemeanors, expressly including "a person or his agent or employee, directly or indirectly maintaining a room for the registry of bets," (#28.536 *Mich. Stat. Anno.*, §750.304 *Comp. L. of Mich.* 1948), was the prosecution of Petitioners, who allegedly placed or received bets, under the judicially created or discovered felony of "conspiracy to violate the gambling laws", in a mass trial, want of due process? Fourteenth Amendment.

7. Where a witness was called before the trial jury; and asked one incriminating question, which he refused to answer on the ground that his immunity was legally insufficient; and the witness then excused; after which a transcript of the testimony of the witness given on preliminary examination was read; were Petitioners deprived of confrontation before the jury? Fourteenth Amendment, Sixth Amendment.

D.

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The first four questions presented for review involve Proceedings for the Discovery of Crime[1], generally known as the "One Man Grand Jury Law". As to the provisions involved in this appeal, the law remains substantially unchanged; from 1948, and from *In re Oliver,* 333 U. S. 257, 68 S. Ct. 499; 92 L. Ed. 682; and is appended hereto; Sections 28.943-28.946; 29.958-28.959; *Mich. Stat. Anno.,* Secs. 767.3-767.6; *Comp. L. of Mich.,* 1948, as last amended in 1951; §28.943-28.946 (2) *Mich. Stat. Anno. Suppl.* (In appendix hereto).

Question 5 involves construction and constitutionality of Sections 28.773 and 28.774, *Mich. Stat. Anno.;* Sections 750.505 and 506 *Comp. L. of Mich.,* 1948; as follows:

> "28.773 Same; indictable common law offenses. Sec. 505. Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five (5) years or by a fine of not more than two thousand five hundred (2,500) dollars.
>
> "28.774 Optional jail sentence for first offenders convicted of felonies. Sec. 506. Whenever any person shall be convicted of a first (1st) offense herein declared to be a felony, punishable by imprisonment for a term of not more than five (5) years, the court may instead of imposing the sentence provided, sentence such convicted person to the county jail for a period not to exceed six (6) months."

---

[1]So designated by the original Act, Act 196, *Public Acts* of 1917. The Constitution of Michigan requires that the object of a statute be stated in the title; Article V, Sec. 21; Constitution 1908. Although now included in the Code of Criminal procedure, the pertinent sections are to be construed as though still a separate act; *People vs. Wolfson,* 264 Mich. 409; 250 N. W. 260.

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Question 5 also involves repeal of the English Statutory Common Law, Act of the Governor and Judges of the Territory of Michigan, September 16, 1810; appended hereto.

The first four questions, concerning separation of powers, involved Michigan Constitution of 1835, Article III:

> "*Division of the Powers of the Government.* The powers of the government shall be divided into three distinct departments; the legislative, the executive and the judicial; and one department shall never exercise the powers of another, except in such cases as are expressly provided for in this Constitution."

In admitting Michigan to the Union, the Constitution of 1835, containing the above, was expressly ratified; 3 Stat. 19; approved June 15, 1836, by the Congress of the United States, under Article IV, Sec. 3, United States Constitution. This follows Section 1 of Articles I, II, and III of the United States Constitution, as to separation of powers; and is, in turn, followed by Article IV of the present Michigan Constitution of 1908. (Appendix hereto).

Question 6 involves a comparison between the judicial crime of "conspiracy to violate the gambling law", and the statutory crimes involving gambling, Secs. 301-305 of the Michigan Penal Code, Secs. 28.533-28.537, *Mich. Stat. Anno.*, Secs. 750.301-750.305, *Comp. L. of Mich.* 1948, hereto appended.

The Federal Constitutional Provisions involved, are the Fifth, Sixth and Fourteenth Amendments. (Appendix hereto).

E.

CONCISE STATEMENT OF FACTS

Petitioners were convicted with others in the Circuit Court of Genesee County, Michigan, of the "Common law crime" of "conspiracy to violate the gambling law". Henry R. Pickett and Harold Wirsing were sentenced to serve from one to five years (at the option of the Parole Board) in Southern Michigan Prison, and fined $2,500.00

each plus costs, with the recommendation of two years if the fine is not paid (R. 13). Richard Kirby was sentenced to four years' probation, to include thirty (30) days in the County Jail, $1,000.00 fine, and $3,000.00 costs (R. 15). Their conviction was upheld by the Supreme Court of Michigan.

Prosecution arose out of "Proceedings for the Discovery of Crime", generally known as the Michigan One-Man Grand Jury Law (*Mich. Stat. Anno.*, §28.943-28.946; #767.3 to 767.6, *Comp. L. of Mich.*, '48). (Appendix).

The judge-grand juror issued a warrant (R. 23) and petitioners were arraigned thereon. Preliminary examination before another Circuit Judge was held; and the petitioners held for trial (R. 4), which resulted in a verdict of guilty by the jury. Sentence then followed.

The Michigan one-man grand juror procedure has been before the United States Supreme Court, *In re Oliver*, 333 U. S. 257, 68 Supreme Court 499, 92 L. Ed. 682. A stenographer, investigator and, in this case a special prosecutor, were appointed by the grand juror. A written transcript of the testimony of all witnesses and rulings is normally made, and kept by the grand juror, but available only to the Prosecuting Attorney for his use.

Upon the trial of the cause, numerous irregularities and claimed abuses in the conduct of the one-man grand juror, hereafter discussed, were testified to by the People's witnesses, and not denied by testimony, nor by the Prosecuting Attorney or Attorney General in the Michigan Supreme Court. At the trial, the Prosecuting Attorney had the transcript of all the testimony of the witnesses at their various appearances before the grand juror. The People's witnesses at the trial were among those who had been before the grand Juror. The Prosecuting Attorney refused and the Court would not order the release of the transcript of the testimony before the grand juror to counsel for petitioners for their use in cross-examination, impeachment or contradiction (R. 63-67, 251-260).

The grand juror was subpoenaed by the petitioners. However, the trial court ruled only one question could be asked him; in effect, in your *opinion* does the testimony of the witnesses as given in court at the trial differ substantially from their testimony before you as a grand juror? Answer Yes or No (R. 257-260).

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The information (R. 25) and the bill of particulars (R. 28) which the petitioners were called upon to meet charged conspiracy to violate five (5) sections of the Michigan Statutes relative to gambling (Appendix); the violation of the gambling statute itself being only a misdemeanor.

The offense of "conspiracy to violate the gambling law" is not found in any statute, but in the opinions of the Supreme Court of Michigan, based upon Sections 28.773-28.774, *Mich. Stat. Anno.*, quoted under (D) above.

Following are instances of what petitioners object to, taken from the Record in the State Court:

People's witness Joseph Menosky testified, on cross examination: His first appearance before the "one-man grand jury" was in response to a phone call, to go to a lawyer's office (R. 94), where he was questioned by the Grand Juror and the special investigator (R. 94). He was in company with his wife (R. 99). Menosky was not sworn (R. 100). Next, he was called to go to a private home (R. 101), and taken there by the special investigator (R. 103); where he was interrogated by the Judge-Juror and the special investigator (R. 105). Shortly before the preliminary examination, December, 1948, he was called to go to the County jail (R. 106), where he was interrogated behind bars (R. 109). This time the Special Prosecutor was present, and he and the Judge-Juror questioned Menosky (R. 110), where a discussion was had of his testimony on previous hearings (R. 111). His fourth appearance, just before the preliminary examination, with Wilbur Arney, was also behind locked doors at the jail (R. 113); and Menosky was interrogated by the Judge-Juror, special prosecutor and investigator (R. 114). People's witness Willie Grubbs, a former mental patient (R. 138), was subpoenaed to appear before the grand jury three or four times (R. 140); he was examined at the County Jail, by the Judge-Juror, special prosecutor and special investigator (R. 140-141). People's witness Mr. Harry Talkow, a business man, testified that the grand jury had "convinced" him that someone had telephoned him (R. 155).

People's witness Wilbur Arney, in his transcript of testimony (Exhibit J, R. 220) testified that he first went to the grand jury in a hotel room (R. 220) because his wife was subpoenaed and taken before the grand jury. Then, the Judge-Juror, special prosecutor and investigator ques-

tioned Arney (R. 221). It was never explained how Arney happened to testify before the grand jury, but he did testify only after his wife had been subjected to an examination, while he was outside the room (R. 221). Arney is unable to explain why he testified five times (R. 222) before the Grand Jury.

Beside the differences in testimony which can be inferred from the fact that the witnesses were questioned repeatedly, Menosky stated that his testimony was "pretty much the same, there might be differences" (R. 125-130). Grubbs claimed that the answers were the same each time (R. 146, 147), although, on the trial, he could not remember what questions were asked (R. 145).

Arney also testified that the Judge-Juror had told him he could be a witness or a defendant (Exhibit J, R. 228). This was apparently not in the grand jury room; but the Judge-Juror was not called as a witness to deny it.

F.

ISSUES RAISED IN STATE COURT

The general question of the constitutionality of the so-called one-man grand jury was raised in 1949 by a written motion to dismiss made in the Circuit Court for the County of Genesee, by stipulation and order made to pertain to the instant case and also to *People vs. Birch;* which opinion is hereto appended. The motion included other grounds. The Circuit Judge granted the motion, upon another ground, but held that the statute was constitutional.

Upon appeal by the People, the Supreme Court of Michigan reversed the Circuit Judge, and, in so doing, specifically held the law was constitutional; *People vs. Birch,* 329 Mich. 38, 47; 44 N. W. (2d) 859; (Appendix) saying that this claim of unconstitutionality "did not require discussion".

On June 4, 1951, after the remanding of the consolidated cases, a motion to dismiss, quash the information, and discharge the Petitioners herein was filed. This was the same day the Petitioners were arraigned upon the Information filed by the Prosecuting Attorney and stood mute (Calendar entries, R. 6).

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This motion to quash (R. 29-34), in Section A, attacked, in effect, the entire one-man grand jury system, upon the basis of separation of powers; that the proceedings, therefore, violated defendant's rights under the Fifth and Fourteenth Amendments; covering questions one and two herein.

Question five herein was raised by Section B of the same motion; that there was no definite standard of conduct proscribed by law, from which a person could know in advance what conduct was criminal (R. 31-32).

Question three herein was raised by the prayer of the same motion, for leave to inspect the proceedings and files of the grand juror (R. 34); and was repeatedly renewed in the proceedings, as will be seen hereafter.

Question six herein, prosecution of the misdemeanor of gambling, raised by judicial fiat to the felony of conspiracy, was raised in Section D of the same motion (R. 33).

The foregoing motion to quash was denied by the Circuit Judge, on October 4, 1951 (R. 7), and an appeal from this order was applied for by the defendants therein to the Supreme Court of Michigan. The Supreme Court of Michigan denied this application December 3, 1951 (R. 35) without opinion, but "without prejudice" to renewal of the motion for Bill of Particulars.

The above arguments were renewed orally before the trial judge, on constitutional grounds (R. 247-251) and denied.

All of the above points were raised again, in substance in the Reasons and Grounds of Appeal (R. 314), formerly known as "assignments of error".

Motions for leave to examine the grand jury testimony for the purposes of impeachment and contradiction were again made at the opening of the trial (R. 63-67) upon express constitutional grounds (R. 65). The trial court indicated that this was improper, because the warrant of the grand juror is in the nature of a warrant by a Justice of the Peace rather than an indictment (R. 68); but ruling was reserved until the tender of the testimony of the Grand Juror, presumably by the defendants, could be made (R. 68).

At the end of the People's case, a request was made to examine the Grand Juror, who was present under subpoena

(R. 251) to learn if his testimony could be used for impeachment or contradiction, also to make a separate record in the absence of the trial jury, to discover whether the one-man grand jury had been judicially conducted (R. 259). The trial court denied this, and suggested a motion in the Michigan Supreme Court (R. 260).

A motion was made in the Michigan Supreme Court, at the term for which the appeal was docketed (appended hereto), to make such a record of the grand jury proceedings, both to determine whether judicially conducted, and for the purpose of ascertaining whether there was testimony which should have been used for impeachment or contradiction. This motion was denied. The brief in support of this motion was incorporated into the Appellants' brief, under arguments and statement of questions involved, 15, 16, 17 and 18; but this point was not discussed in the opinion of the court.

The seventh question here presented arose when a transcript of Wilbur Arney's prior testimony was admitted. Arney had testified before the one-man grand jury at least five times; without any grant of immunity. On the day before the preliminary examination, he was given a written grant of immunity (opinion of Michigan Supreme Court herein). He testified at the preliminary examination. However, at the time of the trial, he had received legal advice, to the effect that the grant of immunity was technically invalid (opinion and R. 186).

Arney was called to the stand, and asked one question, which appeared to be incriminating; and which he refused to answer (R. 183)[1]. He was then excused, after discussion in chambers, until after trial was concluded, when he was required to answer a contempt charge (R. 186).

The Special Prosecutor immediately offered a transcript of testimony of the witness given on the preliminary examination; over express objection as to confrontation of witness (R. 187).[2]

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[1]This was whether he was ever in the employ of two of the Petitioners, which might have involved him directly in the conspiracy as charged, and also under the gambling laws, (appendix).

[2]It was also objected to because it was leading, and defense counsel had no opportunity for the deletion of improper questions and answers (R. 213).

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This was the only constitutional question discussed in detail in the opinion herein of the Michigan Supreme Court.

The "Statement of Questions Involved," in the briefs of the Petitioners herein before the Michigan Supreme Court, and the corresponding Principal Arguments therein, covered the questions here presented for review.

G.

ARGUMENT

1. That the entire Michigan One-Man Grand Jury Law was open to serious doubts as to its constitutionality under the Fourteenth Amendment, was indicated by the opinions of nearly all the Justices of this court; *In re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682; where contempt conviction of a witness was reversed. The opinion of the Court, by Mr. Justice Black, reads in part as follows:

> "And these secret interrogatories can be carried out in day or night, in a public place or in a 'hide-out', a courthouse, an office building, a hotel room, a home, or a place of business; so well is this ambulatory power understood that the one-man grand jury is popularly referred to as the 'portable grand jury'."

Mr. Justice Rutledge, concurring, said:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge, and petit jury * * *.
>
> "This aggregation of powers and inherent concomitant denial of historic freedoms were unknown to the common law. * * * They are altogether at variance with our tradition and system of government. * * * They cannot stand the test of constitutionality * * * there is no semblance of due process * * *."

Mr. Justice Frankfurter, dissenting, said:

> "While there are indications in the opinion of the Supreme Court of Michigan from which we could in-

> fer the constitutional inadequacy of the procedure pursued in this case, we should not decide the constitutional issues and conclude that the Michigan system offends the Constitution of the United States without a clearer formulation of what it is that actually happens under this system * * * than the case before us reveals."

The Supreme Court of Michigan has never answered any of the above questions. However, in the instant case we think the Record shows the practical operations of the judge-jury to have been clearly contrary to due process.

We submit in the judge-grand juror proceedings the judge ceased to function judicially. He became a prosecutor and functioned as the executive branch of the government. This being the case, he violated the doctrine of separation of powers as contained in Article III of the Michigan Constitution of 1835. This Constitution was approved by Congress, 5 Stat. 49, approved June 15, 1836, and Michigan admitted to the Union. All subsequent Michigan Constitutions contained the doctrine of separation of powers. Therefore, when the judge-grand juror failed to function judicially, he violated not only Michigan Constitutional provisions; but the Act of Congress approving the doctrine; and a Federal question is clearly presented.

2. The Record shows that, in this case, the "odd hours and places", include hotel rooms at night (R. 220), private homes (R. 111), lawyers' office (R. 99) and the County Jail behind bars (R. 222, 141, 157, 108). The Michigan Supreme Court said of one witness:

> "Arney had testified a number of times before Judge Liebrand, sitting as a one-man grand jury * * * on the day before the examination of defendants, Arney was given a grant of immunity."

Also, the Record shows that witnesses were questioned in relays by the Special Prosecutor, the Judge, and the Special Investigator (R. 221, 141). On at least one instance, the Special Investigator conducted the grand jury alone (R. 158). Witnesses were often not sworn (R. 100).

These activities indicate that if this is a true grand jury; there is a fatal abuse of the grand jury protection of witnesses from improper influence. In grand juries, only the Prosecuting Attorney, grand jury and witness may be present; *U. S. vs. Kilpatrick,* 16 Fed. 765; *U. S. vs. Edgerton,* 80 Fed. 374; *U. S. vs. Carper,* 116 Fed. Suppl. 817, 13 F. R. D. 483.

The testimony of People's witnesses indicating irregularities in the one-man grand jury hearing, the grand jury proceedings may be opened; last cited cases, and *State vs. McFeely,* 49 A. (2d) 15; *People vs. Minet,* 73 N. E. (2d) 529, 296 N. Y. 315; *Commonwealth vs. Parrish,* 99 P. J. L. 513, 65 York 169 and indictment quashed.

Indictment may be quashed for illegally obtained evidence; *U. S. vs. Bush,* 269 Fed. 455; *U. S. vs. Yuck Kee,* 281 Fed. 341; *People vs. Briggs,* (1880) 60 How. Pr. (N. Y.) 17, privileged testimony of wife (in the instant case alleged co-conspirators finally used as witnesses) (R. 220, 99).

Abuses complained of here were shown on preliminary examination, as appears in the transcript of witness Arney's testimony (People's Exhibit J, R. 188), used in the trial, and thus placed in the Record.

Judicial threats of record must be admitted, *Gordon vs. U. S.,* 344 U. S. 414, 73 S. Ct. 369, 97 L. Ed. 369. Threats of prosecution by the Judge were related by witness Arney (R. 228); although Arney is not clear whether they were made in the "grand jury room" at the jail, or at the door of the jail.

It is not sufficient that the trial jury learn that the witness has given different testimony. Petitioners should be given the opportunity to confront the witness with the testimony, and discredit him before the jury, *Gordon vs. U. S.,* supra.

Abuse of witnesses, and suppression of impeaching evidence, may amount to lack of due process; *Mooney vs. Holohan,* 79 L. Ed. 791; 55 S. Ct. 340; 294 U. S. 103; 98 A. L. R. 406.

From the record, the constitutional objection that the judge-grand juror becomes a protagonist of the executive branch, means this to a witness: He is subject to being taken from his home at odd hours to odd places; his wife may be questioned with him (R. 99), or she may be ques-

tioned while he awaits outside (Arney, R. 220, 231). Once in the room, he is confronted by a judge, special prosecutor and special investigator, who take turns asking him questions. If the judge is not satisfied, he may cite for contempt (*In re Oliver,* supra), or he may threaten prosecution (Arney, R. 228). Or, the special prosecutor can threaten, either prosecution or to make the witness an involuntary witness on the trial, by unwanted immunity. Finally, the special investigator takes the witness to and from the inquisition (R. 103) and listens to his testimony at the hearing. No one knows what the special investigator says to the witness, but it would be a very strong character indeed who would not be swayed in his convictions and testimony by these pressures.

And the same judges who conduct these roving inquests, in turn may sit at the trial, on indictments or warrants brought in by other judge-grand jurors.

3-4. The Michigan Supreme Court has given lip service to the doctrine that the defendant has the right to use the prior testimony of witnesses before the grand juror for cross-examination; but, has, in recent decisions, in each case, denied or construed the right away on technical grounds; see *People vs. McCrea,* 303 Mich. 213, 245, 6 N. W. (2d) 489, 502. In Petitioners' case, without even enunciating any doctrine, the Court refused defendants that right and said it was bound by the "perspicuousness of the reasoning" of previous decisions. This appears contrary to *Gordon vs. U. S.,* 73 S. Ct. 369; 97 L. Ed. 289, 344 U. S. 414.

In *State ex rel Brown vs. Dewell,* 167 So. 687 (Fla. 1936), it was held that the prohibition of the use of grand jury testimony, obtained under *subpoena duces tecum,* nullified the benefit of the subpoena, and unconstitutionally deprived defendant of his organic right to compulsory process in his favor. (Analogy to Sixth Amendment).

We submit that the petitioners were entitled, as a constitutional right, to the benefit of the testimony of witnesses before the grand juror for cross-examination, contradiction and impeachment. It is not consistent with fair play to permit the use of the Grand Juror's records by the prosecuting authorities, and to deny them to the petitioners.

5. The Michigan Statute (28.773 *Mich. Stat. Anno.*) heretofore quoted, provides a penalty for "indictable common law offenses". "Conspiracy to violate the gambling law" could not have been a common law crime, because there was no law against gambling, at common law; 38 *C. J. S.* 142; 6 *Enc. Laws of England* 337. It is a synthetic offense.

The Michigan Supreme Court split over whether misprison of felony was a "common law offense", *People vs. Lefkovitz,* 294 Mich. 263, and has had similar difficulties in other cases in discovering what constitutes a specific "common law offense".

The infirmity of such a statute is that it does not clearly define what conduct is prohibited; save by a reference to a body of legal lore, which few of the most learned understand; cf. *Screws vs. U. S.*, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 *A. L. R.* 1330;

Winters vs. New York, 68 S. Ct. 665, 92 L. Ed. 840, 333 U. S. 507;

Connelley vs. General Construction Co., 46 S. Ct. 126, 269 U. S. 385, 70 L. Ed. 322;

Lanzetta vs. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 1248.

The foregoing cases were largely decided on the basis of "due process", as applicable to a legislative entity.

The Michigan Statute has amounted to a carte blanche delegation by the legislature to the courts to create legal offenses and raising offenses (such as gambling) to felonies; leaving the individual open to prosecution for an offense, that the Supreme Court of Michigan had not, at the time, yet discovered.

In 1810, the territorial government of Michigan repealed all of the English Statutory common law then in force, and all of the French common law from whatever source derived (Act of the Governor and Judges of the Territory of Michigan, September 16, 1810, appended hereto). The effect of this repeal was to recognize in Michigan only the English common law, unaffected by statute. *In re Matter of Lamphere,* 61 Mich. 105, 108; 27 N.W. 882, 883.

Since the body of common law constituting indictable offenses was composed of statutory law as well as the cus-

tomary law, who could sever the statutory common law of criminal conspiracy from the customary common law of criminal conspiracy and still have preserved shape, much less life, in the latter?

When the foregoing opinion by the Supreme Court of Michigan is read in the light of the territorial statute expressly repealing the statutory common law brought over from England, it becomes apparent that, in order to ascertain the delimitations of any common law crime in Michigan, we must separate from the body of that common law crime all elements thereof which owe their origin to the statutory common law other than the customary common law.

The foregoing statement, while generally true of all common law crimes, is especially and pointedly true of the common law crime of conspiracy.

There is only one fact about the common law crime of conspiracy upon which all of the authorities appear to be in agreement; that fact is that knowledge of the original constituent elements of the crime has become veiled in such obscurity as to become undiscoverable.

6. The dangers of the particular doctrine of conspiracy, used to raise a misdemeanor to a felony; obliterating the ordinary criminal principles of evidence and venue; and greatly increasing the ability of law enforcement officers to search and seize without warrant, just because two (2) persons are involved are discussed at length in the concurring opinion written by Mr. Justice Jackson, *Krulewitch vs. U. S.*, 336 U.S. 440, 93 L. Ed. 790; 69 S. Ct. 716.

The Michigan Supreme Court has not told us what constitutes a felonious conspiracy to violate the gambling law; either in general, or specifically, in the instant case. Counsel for Petitioners requested that the People state in either of their two reply briefs of what they considered the charged conspiracy to consist; and how they considered they had connected the Petitioners with it. They did not reply to this request.

Sections 28.533-28.537 *Mich. Stat. Anno.*, and §750.301-305 *Comp. L. of Mich.* '48, do not appear to penalize the making of a bet (only accepting the bet). Does the conspiracy law make felons of those who place bets? There is some testimony that Petitioner Kirby accepted bets at his place of business (R. 134) and also called in bets (R. 153)

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to someone. Some bets were allegedly received from Kirby by the other two Petitioners (R. 76). But there was no showing that Kirby accepted bets from anyone for the purpose of placing them with any of the other defendants; nor, that there was any common purpose or design or conspiracy among the three petitioners, nor among the many defendants tried in a "mass trial". The confusion and hysteria of the mass trial undoubtedly worked against due and orderly process.

As to Petitioners Wirsing and Pickett, it was claimed that they accepted bets on horses, in violation of one of several statutes (which one not specified). (Bill of Particulars R. 28).

The Michigan Legislature has made gambling a high misdemeanor[1] but not a felony (Sections 28.533-28.537, *Mich. Stat. Anno.;* 750.301-305, *Comp. L. of Mich.* '48 appended hereto).

Felony terms are generally longer, and conviction of a felony leads to possible sentence under the habitual criminal law (28.1084 *Mich. Stat. Anno.*, 769.12, *Comp. L. of Mich.* '48) to life imprisonment for a fourth offense; which could be, of course, a fourth gambling conspiracy charge.

The Michigan gambling statutes as quoted hereinafter, contain such language as "any person, or his agent or employee, who shall directly or indirectly keep, maintain * * * etc." indicating a legislative intent that all persons engaged in operating such an establishment be charged as principals, under the misdemeanor statutes; without recourse to a conspiracy law. Likewise, the Statutes apparently exclude mere bettors; who, for all we can learn from the record, were deemed guilty of "conspiracy", herein.

Such specific provisions indicate that the felony law of criminal conspiracy which was created by the court, exactly covers the same combination covered by statutory law; thereby negativing both the legislative intent and the necessity of judicially creating such a criminal felony, "conspiracy". And there is a section of the alphabetical Mich-

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[1]Misdemeanors not cognizable by a Justice of the Peace, involving more than ninety days imprisonment, are here called "high misdemeanors".

igan Penal Code, apparently covering the law of "Conspiracy", sections 151-157, §28.348 to 28.354 *Mich. Stat. Anno.*

So far as we can learn, Michigan is the only state which has a "common law" crime of conspiracy.

7. The Michigan Supreme Court acknowledged the constitutional right to confrontation of witnesses. What it decided was (1) that the statute permitting the testimony of a witness who was absent, dead, or incompetent, could be construed to include a witness who was present, but would not testify. (2) That confrontation was provided, if the defendant had, at any time before trial, an opportunity to cross-examine the witness.

Petitioners submit that the right of confrontation includes the right of a Defendant to cross-examine his accusers in front of the jury; so that the jury may judge between the appearance and manner of the accuser and the accused. A living witness may fail to convince a jury; while the report of his testimony might lead to conviction; *People vs. Sligh,* 48 Mich. 54, 58; 11 N. W. 782 (citing authorities as to unconstitutionality therein). In the trial here, numerous witnesses testified in person. The jury, after several hours of deliberation, asked only that the transcript of the testimony of Arney be re-read (R. 263).

It was assumed by the trial court and by the Supreme Court of Michigan, that Wilbur Arney would not testify at all; but that is not necessarily true. Arney had testified four or five times before the grand jury (R. 220, and opinion of the court), as well as once in open court on the examination in 1948; as to happenings beginning in 1944 (R. 227). The trial was in 1952. Some of his testimony must have varied before the grand jury, or he would not have been recalled so many times. The prosecutor had all this grand jury testimony, which was not available to the defense; and, if Arney had failed to testify the way the People wanted, he faced possible perjury charges.

No attempt was made to ask Arney non-incriminating questions; no attempt was made to protect him from perjury charges by reading his previous testimony to him. No offer was made to the Defendants to cross-examine the witness. He was asked only one apparently incriminating question and then excused (R. 183-188). Therefore, he should have been treated as a hostile witness, who refused

to answer some questions; as in *Pleau vs. State*, 255 Wis. 362; 38 N.W. (2d) 496; not as an absent, dead or incompetent witness.

The right to confrontation is given by Article II, Section 19 of the Constitution of Michigan; and the Sixth Amendment to the United States Constitution; so we submit that this right is part of due process, under the Fifth and Fourteenth Amendments.

Use on trial of a transcript of testimony, taken at a preliminary examination, was held unconstitutional; *U. S. vs. Angell*, 11 Fed. 34; *State vs. Potter*, 6 Idaho 584; 57 *Pac.* 431; and cases cited in *People vs. Sligh*, 48 Mich. 54, 57; 11 N. W. 782.

SUMMARY

While we have presented seven questions for review, we submit that, at least to a degree, they all grow out of the dangers of a judge-conducted "grand jury" and a judge-created criminal offense; in other words, of the judiciary infringing on two other departments of government, in order to prosecute and punish a misdemeanor; involving no corruption.

When a high judge conducts the investigation, the citizen called before the grand jury feels undue pressure to testify as the judge requires (cf. *In re Oliver*) by express (here, R. 228) or implied threats. Then, to assist prosecution, it was permitted to withhold the grand jury testimony from the use of the petitioners.

The charge brought by the judge-juror is the judge-made charge of conspiracy, which, as the Michigan Supreme Court said herein, makes a matter of "discretion", the ordinary rules of criminal evidence; as well as increasing the penalty.

Finally, when a witness is called on the trial, knowing that the prosecution holds several possibly conflicting versions of his testimony before the grand jury; as well as testimony given in court the day after he had been re-interrogated and forced to accept immunity; the witness risks contempt, rather than perjury.

The combination of pressures may bring out the truth; or maybe only what the judge-juror, special investigator, and special prosecutor think is the truth. But, taken together, the impact and the methods; coupled with a mass

trial, create a system very heavily laden with pressure on witnesses; and very dangerous to the liberties of the people, and the fair administration of justice.

So, the Questions for Review, whether examined individually or collectively, present a system peculiar to Michigan; and far removed from the Anglo-Saxon system of criminal procedure; and the American concept of due process.

WHEREFORE, the Petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the Supreme Court of the State of Michigan, to the end that this cause may be reviewed and determined by this court as provided by the authority of the United States, and that the judgment herein of the said Supreme Court of Michigan be reversed and for such other and further relief as to this court may seem proper.

HENRY R. PICKETT,
RICHARD L. KIRBY,
HAROLD WIRSING,
Petitioners.

By: HOWARD D. CLINE,
FRANCIS J. GEORGE,
Counsel of Record for Petitioners.

FRANK C. SMITH,
Of Counsel.

APPENDIX

Opinions Upon Rendering Judgment Sought to be Reviewed.

PEOPLE VS. PICKETT, 339 Michigan 294, 63 N. W. (2d) 681.

Appeal from Genesee; Dehnke (Herman), J., presiding. Submitted January 14, 1954. (Docket No. 62, Calendar No. 45,662). Decided April 5, 1954. Rehearing applied for.

Henry T. Pickett, Richard L. Kirby, Harold Wirsing, and another now deceased, were convicted of conspiracy to violate the gambling laws. Affirmed.

Frank G. Millard, Attorney General, Edmund E. Shepherd, Solicitor General, Chester R. Schwesinger, Prosecuting Attorney, and Albert H. Callahan, Assistant Prosecuting Attorney, for the people.

Cline & George, for defendants Pickett and Kirby.

Frank C. Smith, for defendant Wirsing.

Bushnell, J. Upon the complaint of the prosecuting attorney for a judicial investigation concerning certain criminal offenses, the Honorable Karl K. Leibrand, circuit judge of Bay county, as acting judge of the circuit court for the county of Genesee, conducted an inquiry under the provisions of *Comp. L. of Mich.* 1948, § 767.3 et seq. (*Mich. Stat. Anno.* § 28.943 et seq.). As a result of that inquiry a warrant was issued for the arrest of defendants Henry R. Pickett, Richard L. Kirby, Harold Wirsing and Edward R. Reinke (the latter now deceased) and 23 other persons, on the charge that they:

"did feloniously and unlawfully conspire, confederate, combine and agree together, with each other, and with divers other persons unknown, to violate sections 301, 302, 303, 304 and 305 of Act 328 of the *Public Acts of Michigan* for the year 1931 as amended, the same being provisions of the Michigan criminal code prohibiting gambling, betting, the taking of bets, the possession of gambling equipment, and the using or permitting the use of premises for gambling purposes by, among other things, taking, receiving and accepting bets upon the outcome of horse races, and keeping or maintaining places where bets upon the outcome of horse races were accepted."

Those charged were admitted to bail and at an examination held before the Honorable Shirley Stewart, circuit judge of St. Clair county, acting in Genesee county, the defendants were represented by counsel and the people's witnesses were cross-examined. Motions to dismiss on the grounds of insufficiency of the prosecutor's petition and the claimed unlawful delegation of authority from Honorable Paul V. Gadola, circuit judge of Genesee county, to Judge Leibrand was granted by Honorable H. Russell Holland, circuit judge of Oakland county, acting in Genesee County, on the ground of unlawful delegation of authority.

On appeal this Court held against the defendants and reversed Judge Holland. See *People vs. Birch,* 329 Mich. 38. Following the disposal of other interlocutory matters in which the Honorable John J. Simpson, circuit judge of Jackson county, and other circuit judges participated, trial was commenced on information before Honorable Herman J. Dehnke, circuit judge of Alcona, Iosco and Oscoda counties, sitting as a judge of the circuit court of Genesee county. Upon leave granted, Pickett and 3 other defendants have appealed from their conviction and sentence.

The 22 questions presented in this appeal have been considered. Some are the usual propositions raised in criminal appeals, but others are of unusual nature and merit extended discussion.

The first of these has to do with the claimed invalidity of the method of preparing the jury list in the city of Flint and the contention that this method is contrary to law. Several days before the trial commenced, a challenge to the array was filed, supported by the affidavit of William J. Kane, attorney for some of the defendants. This motion was denied.

The general statutory enactment respecting the preparation of jury lists is *Comp. L. of Mich.* 1948, §602.120 (*Mich. Stat. Anno.* §27.245, which reads in part:

> "The supervisor and township clerk of each township, and the supervisor or assessor, as the case may be, and alderman of each ward of assessment district in any city, shall, at the time appointed by law for the review of the assessment roll for each year, make

> a list of persons to serve as petit jurors, and a list of persons to serve as grand jurors for the ensuing year."

It is argued that the provisions of the charter and the ordinance of the city of Flint, under which the city assessor is required to compile and return a jury list, are in contravention of the statute and, therefore, should be held invalid.

The present method of providing a jury list for the city of Flint has been in use since 1935. The duties of the city assessor are specified in section 29 of the city charter which states:

> "He shall perform such other duties as may be required by this charter or by ordinance."

This provision is enlarged by ordinance No. 44, §6.300, which reads:

> "In addition to those duties heretofore specified either by charter of the city of Flint or by ordinance thereof, the city assessor is hereby required from time to time to make lists of persons to serve as either grand or petit jurors from the city of Flint for the circuit court of the county of Genesee, Michigan, and to return the same as directed by law."

Flint is a home-rule city organized pursuant to Act No. 279, *P. A.* 1909, *as amended* (*Comp. L. of Mich.* 1948, §117.1 et seq. [*Mich. Stat. Anno.* 1949 Rev. §5.2071 et seq.]).

It must be noted at the outset that the method used in Flint is not expressly provided for by the statute governing the preparation of jury lists. Flint has a commission form of government, although not a true form with respect to the jury law which contemplates a one-ward city. See *Comp. L. of Mich.* 1948 §602.125 (*Mich. Stat. Anno.* 1953 Cum. Supp. §27.250). The charter of the city of Flint provides for only one assessor, who is a duly constituted city officer. Its municipal area is divided into 9 wards, and it has no alderman. However, a commissioner is elected from each ward, but none of them has assessing powers. We can see no valid reason why the single assessing officer, in compiling jury lists where only one such

officer is provided by the charter, acts in contravention with the general jury statute which mentions "aldermen of each ward or assessment district." On the contrary, the method in force is in substantial conformity with the statute as far as possible under the existing governmental structure.

In *Hewitt vs. Saginaw Circuit Judge,* 71 Mich. 287 (1888), some years before the home-rule act came into existence, Chief Justice Sherwood made an observation which seems applicable to the situation here. In speaking for the Court he said (pp. 292, 293):

> "It may be well contended that the statute invoked by respondent was never intended to apply to a city whose chartered provisions are like those contained in the East Saginaw charter. By that charter the assessor is a city officer, and assesses all the property of the city, and comes more or less in contact with all persons therein having the qualifications of jurors; while in cities incorporated under the general law the person assessing is but a ward officer, not acting beyond the limits of his ward."

Numerous cases are cited involving the priority of State statutes over local ordinances when a conflict exists. Among these is *Noey vs. City of Saginaw,* 271 Mich. 595, in which it was held that cities organized under the home-rule act are subject to legislative control. That case involved a conflict between the statute and ordinance in regard to hours of closing places for the sale of alcoholic liquor. The Court there said (p. 599):

> "'It is the rule that, in the absence of specific statutory or charter power in the municipality, the provisions of an ordinance which contravene a State law are void. *People vs. McGraw,* 184 Mich. 233; 43 C. J., p. 215.'"

The situation in the instant case is somewhat different. It is not so much whether there are conflicting provisions, but rather whether there is a compliance within the purport and meaning of the statute. The charter, in empowering the assessor to "perform such other duties as may be required by this charter or by ordinance", also imposes

upon him the duty of compiling and returning the jury list as required by law. The record before us discloses that substantial compliance has been attained as far as is practically possible. We are therefore constrained to hold that, even though it may be argued that better practice would dictate that the assistance of the several commissioners should be obtained in the preparation of a jury list, the compilation of that list by the city assessor, unaided by the commissioners, is valid.

The second serious question in this appeal is the claim that the admission of the prior testimony of the State's witness, Wilber Arney, was in violation of appellants' right of confrontation and of due process as guaranteed by the 6th and 14th Amendments to the United States Constitution and by article 2, §19, of the Michigan Constitution (1908), as well as contrary to the provisions of *Comp. L. of Mich.* 1948, §763.1 (*Mich. Stat. Anno.* §28.854), and *Comp. L. of Mich.* 1948, §617.59 (*Mich. Stat. Anno.* §27.908).

The Michigan constitutional provision on the right of confrontation reads in part:

> "Sec. 19. In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, * * * to be confronted with the witnesses against him; * * *."

Comp. L. of Mich. 1948, §617.59, provides:

> "Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses."

Section 763.1 reads:

> "On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face."

A statement regarding Arney's testimony is necessary. When Arney was called to the stand at the trial he refused to testify on the ground that "the questions might tend to incriminate me." The jury was excused and the people offered to read into evidence the transcript of the testimony which he gave at the examination. The special prosecutor stated that this was the privilege of the people on the ground of non-availability of the witness. In taking this position the prosecutor relied upon the provisions of *Comp. L. of Mich.* 1948, §768.26 (*Mich. Stat. Anno.*, §28.1049), which reads:

> "Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony, become insane or otherwise mentally incapacitated to testify."

Arney had previously testified a number of times before Judge Leibrand sitting as a one-man grand juror. On December 28, 1948, the day before the examination of defendants, Arney was given a grant of immunity with respect to the following questions:

> "Question No. 1: Have you ever been employed by Henry R. Pickett and/or Harold Wirsing, in the operation of any gambling enterprise being conducted in the city of Flint?
>
> "Question No. 2: If so, give details as to time, place and activity, and extent of such activities insofar as they were connected with the same."

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At the trial and in the absence of the jury the court was informed that Arney was desirous of being advised as to his constitutional rights before he was called upon to testify. He was so advised by the trial judge and was told that under the immunity order granted him he had no right to refuse to testify. In the colloquy that ensued, Arney questioned the validity of his immunity order. The trial was adjourned in order to give him an opportunity to confer with his counsel, who at that time was out of town. When the court reconvened, the trial judge stated again, in the absence of the jury, that he had been advised by one Seidel, attorney for Arney, that he considered the immunity order "ineffective or insufficient". The court then permitted counsel on both sides to discuss the method in which the matter should be developed. The defense took the position that the testimony should be presented in the absence of the jury. The people, however, contended that Arney should be sworn and questioned up to the point of refusal, and that he should then be permitted to make his claim of exemption in the presence of the jury.

Arney's counsel stated that in the event the court should overrule his or his client's objection, that he had advised Arney to refuse to testify and take the position that he would test the validity of the court's ruling on the contempt proceeding which might follow. The jury was then recalled, Arney was sworn and questioned to the point of refusal. The jury was excused and the court ruled that the immunity order adequately protected the witness and ordered him to proceed to answer. Arney and his attorney refused to respect the ruling. The ensuing colloquy was concluded by the court with the statement: "Well, is there anything either side thinks should be done further in the presence of the jury now?" The record shows that to this question there was no response.

The people then stated that they would offer in evidence the transcript of Arney's testimony at the examination. The defendants objected, raising the question of the right of confrontation, and stated that the witness was available. The court overruled this objection, recalled the jury and explained to it that upon Arney's refusal to testify, his testimony given at the examination in the cause had thereby become admissible. The authenticity of the transcript was established by the reporter and Arney was

identified as the person who gave the testimony. One of the attorneys for defendants then requested that the testimony be presented on a question-and-answer basis, whereupon the prosecuting attorney read the questions and the special assistant prosecuting attorney read the answers. After this was completed, the record of appearances at the examination was read into the record, which disclosed that each of the appellants was present and represented by counsel who have continued in that capacity on this appeal. During these proceedings the court asked the defense if they wished to read the cross-examination of Arney or have the prosecutor read it. It was indicated that they preferred to have the prosecution continue the reading and, as on direct examination, the cross-examination was read into evidence in question-and-answer form.

We are mindful of the serious nature of the constitutional rights involved in such practice. So far as we have been able to ascertain the precise question has not been previously passed upon by this Court. However, analogous situations have been discussed in the following cases: *People vs. Myers,* 239 Mich. 105; *People vs. Moore,* 306 Mich. 29; *People vs. Hunley,* 313 Mich. 688 and *People vs. Johnston,* 328 Mich. 213 (20 ALR2d 1001). See, also, extensive annotations of authorities in 15 ALR 495, as supplemented by 21 ALR 662; 79 ALR 1392; 122 ALR 425; and 159 ALR 1240.

The issue here involved, although discussed in appellants' brief with 3 other companion questions, resolves itself into whether the prior testimony of a witness at a preliminary examination may be admitted into evidence at the trial under the statutory provisions of *Comp. L. of Mich.* 1948, §768.26 (*Mich. Stat. Anno.* §28.1049), heretofore quoted, when the recalcitrant witness is produced, had previously been granted immunity, but refuses to testify on the grounds of self-incrimination. Appellants contend that "testimony given at a preliminary examination or a former trial may not be used as substantive proof where the witness is available." 1 *Gillespie, Michigan Criminal Law & Procedure* (1st ed), §419, p. 485. This statement of the law is of sound authority. The questionable point is the construction which, in the light of the circumstances, shall be given to the word "available". This word is defined in Webster's New International

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Dictionary (2d ed), as being: "Capable of availing; having sufficient power, force, or efficacy for the object; effectual; efficacious". It is defined in Black's Law Dictionary (3d ed), as "Suitable; usable; at one's disposal; having sufficient force or efficacy; effectual."

Availability in the sense used by Gillespie must be broadly construed in the context in which it is found. This word does not mean physical presence alone, but is definitive of "having sufficient force of efficacy for the object", which object in this instance is the attainment of justice through the admission of the witness's former testimony.

The statute which permits the use of former testimony authorizes that use by the prosecution, "whenever the witness giving such testimony cannot, for any reason, be produced at the trial".

Under the facts recited, Arney, by invoking the privilege against self-incrimination, although having been granted immunity, made himself as "unavailable" as if he were deceased or absent from the jurisdiction.

Defendants, of course, had the constitutional right to be confronted by the witness. This right was accorded them at the preliminary examination when they had ample opportunity to cross-examine Arney who was there a witness confronting them. They may not be heard now to complain on this ground. *People vs. Schepps,* 217 Mich. 406 (21 ALR 568); *In re Rudnik,* 338 Mich. 577; *People vs. Myers,* supra; *People vs. Moore,* supra; *People vs. Hunley,* supra; and *People vs. Johnston,* supra.

This Court has never departed from the rule that the constitutional rights of an accused are not abridged where the accused at any stage of the proceedings, upon the same accusation, has been once confronted by the witness against him, with an opportunity to cross-examine that witness. 1 *Gillespie, Michigan Criminal Law & Procedure* (1st ed), §474, p. 581.

Although no precise case in point has been found in Michigan, this particular question has been ruled upon in other States. In *Exleton vs. State,* (1925), 30 Okla. Crim. 224 (235 P. 627), the accused at a preliminary hearing had been confronted by a witness against him and had the privilege of cross-examination. The witness subsequently refused to testify for the reason that such testimony would

tend to incriminate him. The court then permitted the testimony of the witness at the preliminary hearing to be admitted into evidence. The court took into consideration the Oklahoma constitutional provision which provided that the accused in a criminal case shall have the right to be confronted by the witnesses against him, and held that the former testimony of the recalcitrant witness was properly admitted.

In *Bridges vs. State,* 26 Ala. App. 1 (152 So. 51) (certiorari denied, 292 U.S. 633 [54 S. Ct. 718, 78 L. ed. 1487]), the witness' testimony was held admissible after a claim of privilege, the prosecution being authorized to read into evidence the former testimony. The court there said (p. 4):

> "This is not now an open question in this State, and while there are some decisions to the contrary, this court and the supreme court have spoken on the question and we see no reason to reopen the subject. The witness * * * having testified on a former trial of this case, with full opportunity for cross-examination and when called to testify on this trial he rendered himself incompetent as a witness without fault on the part of the State, the trial court properly allowed his testimony on the former trial to be read in evidence. * * * He thereby placed himself where he was not available to the State to be used as a witness."

To the same effect is *State vs. Hill,* 143 Kan. 791, (57 P. 2d 49).

Defendants also contend that an insufficient foundation was laid for the introduction of the testimony and that opportunity was not accorded them for cross-examination. The pertinent part of the record heretofore examined in this respect does not bear out this contention. The court offered defendants opportunity to raise further objection to the reading of the transcript of the testimony. That they then declined to exercise this prerogative of objection affords them no grounds for objection now.

Prejudicial error is predicted upon the reading of the transcript by the prosecutor and the special assistant prosecutor. This objection cannot be sustained be-

cause Mr. Cline, defendants' attorney, at the trial agreed that it should go in on a question-and-answer basis and acquiescence is plainly evident. No timely objection was then raised, and if this constituted prejudicial error, which we think not, the error was there waived.

Reversible error is also claimed in that the court placed undue weight on the transcript of the prior testimony in its charge to the jury concerning self-incrimination and immunity. The 3 paragraphs covering this question are not lengthy, nor does the explanation by the court on this point appear to be biased or prejudicial. Rather it is a succinct explanation which clarifies the effect of Arney's testimony.

Defendants further argue that reversible error came into the case when the people were permitted to examine their witness, Louis E. Zumsted, regarding the telegraphic equipment (news ticker) used in the operation of gambling enterprises after this witness disclosed that he had been indicted in a similar matter in another county. Appellants argue that the jury was led to believe that a State-wide gambling conspiracy existed.

We have always been reluctant to reverse where improper testimony has inadvertently crept into the record through no fault of counsel. An examination of this testimony requires the conclusion that the statement regarding other matters did not prejudice the defendants to the extent that a mistrial was mandatory. On the contrary, we agree with the statement of the trial judge who, in ruling on this point, said:

> "Well, as it appears to me now, I think counsel exaggerate in their own minds the danger to the fairness of the trial, from the standpoint of the defendants, and the motion for a mistrial may be considered denied."

If any error existed, it was sufficiently cured by the court who, in charging the jury said:

> "Another cautionary instruction, you should not complicate the performance of your duty by speculating on the reasons which were responsible for some of the witnesses refusing to answer questions or tes-

tify, and I should also say to you that no claim is made that if the conspiracy charged in this case existed, it had any ties or connections beyond Genesee county."

The statute on which the information is based reads:

"Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this State, shall be guilty of a felony, punishable by imprisonment in the State prison not more than 5 years or by a fine of not more than 2,500 dollars." *Comp. L. of Mich.* 1948, §750.505 (*Mich. Stat. Anno.*, §28.773).

In attacking the validity of the statute and the information, defendants argue that:

"(7) The information is so vague, indefinite and uncertain as not to inform the defendants or any of them of the nature and cause of the accusations against them.

"(8) The statute (*Comp. L. of Mich.* 1948, §750.505 [*Mich. Stat. Anno.*, §28.773]) upon which the information is based, is subject to the infirmity last aforesaid because it is so vague, indefinite and uncertain as not to enable the defendants to know what is forbidden, and constitutes a delegation by the Michigan legislature to courts and juries of the legislative power to determine what acts should be held to be criminal and punishable, and such statute, therefore, violates the due process clause of section 1 of the 14th Amendment of the Constitution of the United States and article 2, §16 and article 4, §1 of the Michigan Constitution (1908).

"(9) The language of the statute (*Comp. L. of Mich.* §750.505 [*Mich. Stat. Anno.*, 28.773]) does not constitute a fixing of an ascertainable standard of guilt and is not adequate and sufficient to inform the defendants of the nature and cause of the accusations against them.

"(10) The information and the statute upon which the same is based, is repugnant to the due process

clause of the 14th Amendment of the United States Constitution and of article 2, §16 of the Michigan Constitution (1908), and is therefore void.

"(11) The information and the statute upon which the same is based, purporting to subject persons to punishment for crime, fails to define what conduct is sought to be made criminal and constitutes an unlawful delegation of legislative power to the courts; being violative of the due process clause of the Federal and State Constitutions.

"(12) It being alleged the substantive offense has been committed, the defendants may not be prosecuted under the scatter-gun of conspiracy."

These questions do not merit individual consideration, notwithstanding the fervor of the argument of counsel. This Court has previously adjudicated these very contentions and our observations in the decisions hereafter cited fully answer the questions raised. *People vs. Summers,* 115 Mich. 537; *People vs. Chambers,* 279 Mich. 73; *People vs. Causley,* 299 Mich. 340; *People vs. Ormsby,* 310 Mich. 291; *People vs. Norwood,* 312 Mich. 266; *People vs. DeLano,* 318 Mich. 557; *People vs. Simms,* 322 Mich. 362; *People vs. Pichitino,* 337 Mich. 90 (certiorari denied, 347 U.S. 913 [74 S. Ct. 477, 98 L. ed. 353]). What was said in these cases is applicable here, and the validity of the statute, therefore, must be sustained.

Appellants quote at length from Mr. Justice Jackson's concurring opinion in *Krulewitch vs. United States,* 336 U. S. 440 (69 S. Ct. 716, 93 L. ed 790), and urge this Court to adopt the view expressed therein. This case has been examined. Its application to Federal law in regard to extra judicial declarations of a co-conspirator is unquestioned but its holding is not applicable here. However persuasive the reasoning of the Krulewitch opinion may appear to counsel, it does not justify our overruling our own decisions on the constitutionality of the statute in question.

Among the errors assigned by appellants relative to the grand jury proceedings are those pertaining to denial of their alleged right to use the testimony, records and find-

ings of the grand jury, thus depriving them of claimed constitutional rights. Some 20 pages of the briefs are devoted to the claimed merits of this contention and many authorities are cited from other jurisdictions which are undoubtedly enlightening and persuasive, and it is argued that we should accept "this enlightened view." A point-by-point discussion is unwarranted in view of the decisions of this Court on this subject, which are controlling and sufficient. *People vs. Butler,* 221 Mich. 626; *People vs. Baxter,* 245 Mich. 229; *People vs. McCrea,* 303 Mich. 213; and companion cases in 303 Michigan, arising out of the one-man grand jury proceedings, pages 287 et seq.; *People vs. Roxborough,* 307 Mich. 575; *In re Slattery,* 310 Mich. 458 (certiorari denied, 325 U.S. 876 [65 S. Ct. 1553, 89 L. ed. 1993]); *People vs. Birch,* 329 Mich. 38 (prior decision in this cause on motion to dismiss).

The perspicuousness of the reasoning in the aforecited decisions of this Court affords no other construction in the instant case. No valid reason is found here to overrule the binding effect of these decisions. In light of the foregoing, defendants' contention on these points cannot be sustained.

Other errors assigned are found to be without merit; nor is specific discussion of them necessary. Upon examination of the record as a whole, we conclude that the defendants had a fair trial and were not deprived of due process of law. Their constitutional rights were fully protected.

Notwithstanding the length of this opinion, in the light of appellants' insistence, we add the following:

The rule relating to admission of testimony in conspiracy cases was stated in *People vs. Fleish,* 321 Mich. 443, 459, where it is said:

> "In conspiracy cases it is quite impossible to formulate a precise rule of evidence as to what testimony is and what is not admissible as being competent and relevant. Within reasonable bounds the rulings of this character are within the discretion of the trial court and in the absence of a showing of prejudicial error such rulings do not afford a ground of reversal."

See, in this regard, *Comp. L. of Mich.* 1948, §768.29 (*Mich. Stat. Anno.*, §28.1052).

What was said in *People vs. Mosley*, 338 Mich. 559, 566, is equally applicable here:

> "In determining whether irregularities in a criminal trial are grounds for reversal, the test to be applied is not whether there were some irregularities but whether defendant had a fair and impartial trial. *People v. O'Hara*, 278 Mich. 281; *People v. Logie*, 321 Mich. 303."

The trial judge did not err in denying a new trial. There is sufficient testimony and ample proof to support the verdict.

The judgment and sentence appealed from is affirmed.

BUTZEL, C. J., and CARR, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

PEOPLE vs. BIRCH, SAME vs. PICKETT, 329 Mich. 38, 44 N. W. (2d) 859.

Appeal from Genesee; Holland (H. Russel). J., presiding. Submitted October 13, 1950 (Docket No. 80, Calendar No. 44,590). Decided December 5, 1950.

Miller Quinn Birch and others and Henry R. Pickett and others were charged with conspiracy to violate the gambling laws. Cases dismissed on motion. Plaintiff appeals. Reversed and remanded.

Leon A. S. Seidel, Prosecuting Attorney, and Richard C. Fruit, Assistant Prosecuting Attorney, for the people.

Cline & George, for defendants.

CARR, J. The questions involved in these cases arise out of certain proceedings in the circuit court of Genesee county. The material facts are not in dispute. On March 2, 1948, the prosecuting attorney of said county filed a petition in the court setting forth that information had been placed before him indicating that certain crimes had been committed within the county, and further alleging that, if such information were false, the crime of perjury had been committed. An inquiry to be conducted in accordance

with the so-called one-man grand-jury provisions of the criminal code of the State was asked, for the purpose of determining the truth or falsity of the charges of criminal conduct to which the petition referred. The prosecutor further asked that "necessary procedure be taken to designate or appoint or have designated or appointed, in accordance with the statutes in such cases made and provided, one of the circuit judges of the seventh judicial circuit or one of the judges of another judicial circuit for the State of Michigan, to conduct said one-man grand-jury inquiry and investigation," and that witnesses be subpoenaed for the purpose of taking testimony.

At the time the petition was filed the Honorable Paul V. Gadola was acting as presiding judge of the Genesee circuit court, and, on the same day, he made an order stating that on the 8th of March following the court would convene at the courthouse in the city of Flint for the purpose of conducting an investigation as prayed. The order further directed the attendance of the prosecuting attorney of the county, or someone duly appointed in his place, the official court reporter, and the sheriff and deputies, for the purpose of rendering assistance in such investigation. The clerk of the court was further directed to issue subpoenas to witnesses on the request of the prosecutor.

Under date of March 16, 1948, Judge Gadola made a further order in the matter, referring to the petition of the prosecuting attorney and designating Circuit Judge Carl K. Leibrand to conduct the investigation "together with this court, in an advisory capacity or otherwise, as this court may from time to time designate." The order recited that Judge Leibrand had been assigned to the Genesee circuit by the presiding circuit judge of the State. Thereafter, Judge Leibrand proceeded to conduct the investigation. Witnesses were called and examined by him, findings made, and warrants issued including the warrants involved in the above entitled cases. He also made an order appointing Melvin E. Orr, a member of the bar of Michigan, to assist in the investigation, and appointed investigators and an official stenographer, requiring that they take the statutory oath of secrecy.

It further appears that Judge Gadola made and entered an order in terms authorizing the judge conducting the in-

vestigation to appoint a member of the bar to assist therein, and that he and Judge Leibrand joined in an order designating Mr. Orr as special assistant prosecuting attorney of Genesee county to aid and assist the grand-jury investigation. Judge Gadola also made an order authorizing payment to another attorney for time spent as special assistant prosecutor in connection with the grand jury; and further, by order filed September 16, 1948, directed that cases resulting from the investigation should be tried before a circuit judge from without the seventh judicial circuit, assigned to such circuit by the presiding circuit judge of the State. The orders appointing special prosecutors were made at the request of the prosecuting attorney of the county by petitions addressed to the court.

The warrants issued for the arrest of the defendants in the instant cases were duly served. In the case of *People vs. Pickett,* an examination was held before the Honorable H. Russel Holland, one of the circuit judges of the Oakland county circuit court, sitting in Genesee county by designation in accordance with the statute. In *People vs. Birch,* no examination was held. Identical motions were presented in both cases, asking for the dismissal of the warrants on the ground that Judge Leibrand had no authority to issue them, and alleging further that the petition of the prosecuting attorney was fatally defective because of failure to aver specific facts, that it was insufficient to authorize the holding of the investigation, and that the statutory provisions in accordance with which such investigation was conducted were unconstitutional and void. Judge Holland held that the grounds on which the motions were based, other than those relating to the authority of Judge Leibrand, were without merit. On the basis of the proceedings taken in the Genesee circuit court he came to the conclusion that Judge Gadola, by his order of March 2, 1948, had constituted himself the grand juror to conduct the inquiry, that the subsequent order directing Judge Leibrand to act in the matter amounted to an attempted delegation of the exercise of the authority that Judge Gadola had assumed, that such action was not authorized by the statute, and that it was in consequence void. An order was entered granting the motions to dismiss the warrants. On leave granted, an appeal on be-

half of the people of the State has been taken to this Court by the prosecuting attorney of Genesee County.

The first question for consideration is whether by his order of March 2, 1948, Judge Gadola constituted himself a grand juror for the purpose of conducting the investigation. It is, we think, significant that the order did not specifically so provide. As before noted, the petition of the prosecutor to which the order referred asked for an assignment of the inquiry to some judge of the local circuit or to a visiting judge. We think it a fair inference from the specific language used that Judge Gadola, acting as presiding judge of the circuit, intended to recognize the fact that the petition had been filed for an investigation, and to indicate by his order that the court regarded it as requiring judicial action. The subsequent order in terms assigning the investigation to Judge Leibrand indicates the interpretation placed by Judge Gadola on the prior order. He did not undertake to transfer the matter from himself to Judge Leibrand, but, rather, designated the latter to conduct the investigation. Judge Leibrand thereupon proceeded to act in the matter in accordance with the provisions of the statute. He took testimony, determined that there was probable cause to believe that the crimes charged against defendants, as well as offenses by other parties, had been committed, and issued warrants accordingly.

As we view the situation, Judge Gadola, by his orders in question, was undertaking to act in his capacity as presiding judge of the circuit. As such he was charged with certain duties and responsibilities, and vested with authority, with reference to the carrying on of the work of the court. The order authorizing Judge Leibrand to conduct the investigation as well as the orders designating special assistant prosecuting attorneys of the county to assist in the investigation, and providing for compensation of one of such assistant prosecutors, were, we think, intended as an exercise of such authority and a discharge of incident duties. They should be construed accordingly. Obviously the order of September 16, 1948, with reference to the trial of cases resulting from the investigation, was made for the same reason. It was not a part of the investigation held under the statute and the petition of the prosecuting attorney, and a like interpretation should be placed on

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the other orders made by Judge Gadola in connection with the matter.

The situation here is not materially different from that presented in *People vs. Phelps,* 261 Mich. 45. There the defendant was prosecuted for perjury, the charge being based on testimony given by him in a one-man grand-jury proceeding. The investigation was conducted in Jackson county by the Judge of another circuit who took action on the petition of the prosecuting attorney, conducting the investigation in accordance with the statute. The trial court granted a motion to quash the information and dismiss the cause on the ground that the judge conducting the investigation had no jurisdiction to do so. He had, however, been duly assigned by the presiding circuit judge of the State to hold court in Jackson county, and this Court, in reversing the order of dismissal and upholding the procedure taken, declared that:

> "A circuit judge sitting in any circuit on assignment of the State presiding circuit judge has full jurisdiction of a circuit judge."

So in the instant case Judge Leibrand, having been duly assigned by the presiding circuit judge of the State to hold court in Genesee county, had all the authority of a circuit judge in that county. The fact that the assignment did not expressly designate what matter, or matters, he would hear is not material. See, also, *People vs. Wolfson,* 264 Mich. 409.

For the reasons indicated, we conclude Judge Gadola did not by his order constitute himself a grand juror, that the designation of Judge Leibrand to conduct the investigation as a part of the work of the circuit was authorized and proper, that Judge Leibrand alone acted in conducting the investigation, which, under the statute, the petition therefor having been filed by the prosecuting attorney of the county, was mandatory, and that he was invested with full authority in the premises. The reason assigned for dismissing the warrants in the instant cases was not well founded.

On behalf of defendants it is argued that the petition filed by the prosecuting attorney was not sufficient to justify the holding of an investigation under the statute, and

that the order of dismissal should be sustained for that reason. It is claimed that the prosecutor failed to allege facts tending to establish that any specific crime or crimes had been committed. The purpose of the statutory provisions pursuant to which the investigation was held was, as indicated by the title of the act as first enacted in 1917 (PA 1917, No. 196), to authorize "proceedings for the discovery of crime". To that end the complaint by which the proceeding is initiated may be on information and belief, and action may be taken by the justice or judge to whom the complaint is submitted if he has "probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense". To the end that the purpose of the statute may be accomplished it should, as pointed out in *People vs. Wolfson,* supra, receive a liberal construction.

The petition filed by the prosecuting attorney in the proceedings involved in the instant cases set forth that he had information leading him to the conclusion that "certain crimes and offenses" had been committed in Genesee county, or, in the alternative, that perjury had been committed with reference thereto. In *People vs. St. John,* 284 Mich. 24, the defendant's conviction on a charge of perjury committed in the course of a one-man grand-jury investigation was affirmed by an evenly divided court. It was contended in his behalf that the petition for the investigation was insufficient and that, in consequence, the proceeding was wholly void. In that case the petition filed made no reference to any specific offense, while the complaint on which Judge Leibrand acted in the instant matter indicated that whether perjury had been committed was a proper matter for inquiry. Ordinarily a prosecutor preparing such complaint cannot be specific as to particular offenses or persons. Investigation under the statute is sought for the purpose of determining whether there is probable cause to believe that violations of the law have occurred within the jurisdiction, and, if so, the details thereof, and the guilty parties. We agree with the conclusion of Judge Holland that the petition by which the grand-jury investigation conducted by Judge Leibrand was initiated was not fatally defective.

The claim advanced by defendants, as to the constitutionality of the statute, does not require discussion. The matter has been before this Court in prior cases and the validity of the law has been upheld. See *In re Slattery*, 310 Mich. 458 (certiorari denied, 325 U.S. 876 [65 Sup. Ct. 1553, 89 L. ed. 1993]). See also, *People vs. Hancock*, 326 Mich. 471.

The order from which the appeal has been taken is reversed, and the causes are remanded for further proceedings therein.

BOYLES, C. J., and REID, NORTH, DETHMERS, BUTZEL, BUSHNELL, and SHARPE, J. J., concurred.

JUDGMENT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of April in the year of our Lord one thousand nine hundred and fifty-four.

Present the Honorable
HENRY M. BUTZEL,
Chief Justice,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE,
EMERSON R. BOYLES,
NEIL E. REID,
JOHN R. DETHMERS,
HARRY F. KELLY,
Associate Justices.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs. 45662

HENRY R. PICKETT, RICHARD L. KIRBY, and HAROLD WIRSING,
Defendants.

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for

the County of Genesee, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Genesee be and the same is hereby in all things affirmed.

DENIAL OF REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventh day of June in the year of our Lord one thousand nine hundred and fifty-four.

Present the Honorable
HENRY M. BUTZEL,
Chief Justice,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE,
EMERSON R. BOYLES,
NEIL E. REED,
JOHN E. DETHMERS,
HARRY F. KELLY,
Associate Justices.

THE PEOPLE,

vs. No. 45662

HENRY R. PICKETT, et al.

A motion for rehearing having been heretofore submitted herein, It is hereby denied.

STATE OF MICHIGAN — ss.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the fore-

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going is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 11th day of June in the year of our Lord one thousand nine hundred and fifty-four.

Hugh H. Carpenter (Signed)
Clerk.

MOTION FOR LEAVE TO EXAMINE JUDGE-JUROR RECORDS

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Appellee,
vs.
HENRY R. PICKETT, et al.,
Defendants and Appellants.

Cal. No. 45662

Comes now the above named Defendants and Appellants, Henry R. Pickett, Harold Wirsing, Edward Reinke (now deceased), and Richard L. Kirby by their attorneys, and respectfully move the Court to order and direct the following:

1. The testimony taken and proceedings had before the Honorable Karl K. Leibrand, acting as a one-man Grand Juror, be submitted to and made available for the inspection of counsel for the Defendants.
2. The testimony of Judge Leibrand be taken relative to his proceedings as a one-man Grand Juror.
3. That a Record be made of the testimony before the Grand Juror, and the Grand Juror's own testimony, material to the issues involved in this case, and be settled before this Court or before a Circuit Judge designated by this Court, and that said Record, when so settled and

printed as required by law, become a part of the Record on Appeal in this cause.

This motion is based upon the files and records of said cause, the printed Record heretofore certified and filed with this Court, the Statement of Facts annexed hereto, and Brief in support thereof.

REQUEST FOR ORAL ARGUMENT

We respectfully request permission be granted for oral argument of this motion, in accordance with Court Rule 10, Section 4.

DENIAL OF MOTION TO EXAMINE JUDGE-JUROR RECORDS

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of October in the year of our Lord one thousand nine hundred and fifty-three.

Present the Honorable
JOHN R. DETHMERS,
Chief Justice,
CLARK J. ADAMS,
HENRY M. BUTZEL,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE,
EMERSON R. BOYLES,
NEIL E. REID,
Associate Justices.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs. 45662
HENRY R. PICKETT, et al.,
Defendants.

In this cause a motion is filed by defendants to amend the record heretofore filed herein by adding thereto cer-

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tain testimony and proceedings had before the Grand Jury, and a brief in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, It is ordered that the motion be and the same is hereby denied.

STATE OF MICHIGAN — ss.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this fifth day of October in the year of our Lord one thousand nine hundred and fifty-three.

Hugh H. Carpenter, (Signed)
Clerk.

MICHIGAN'S INQUISITORIAL LAW

Sections 28.943-28.946, *Callaghan's Mich. Stat. Anno.*

§28.943. Proceedings before trial; investigation of suspected offenses by judge or justice; summoning witnesses, inquiry, compensation. Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer

such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings. *Comp. L. of Mich.* '29, §17217).

§28.944 Same; apprehension of suspected person; removal of public officers, procedure; disclosure of statement. Sec. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer, shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors. (*Comp. L. of Mich.* '29 §17218).

§28.945 Same; failure of witness to appear or answer question; penalty. Sec. 5. Any witness neglecting or re-

fusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred [100] dollars or imprisonment in the county jail not exceeding sixty [60] days or both at the discretion of the court: *Provided*, that if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence. (*Comp. L. of Mich.* '29, §17219).

§28.946 Same; incriminating answers of witness. Sec. 6. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. (*Comp. L. of Mich.* '29, §17220).

STATUTE REFERRED TO IN THE INQUISITORIAL STATUTE

Sections 28.958-28.959, *Callaghan's Mich. Stat. Anno.*

§28.958 Same; disclosure of indictment for felony. Sec. 18. No grand juror, stenographer or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested. (*Comp. L. of Mich.* '29, §17232).

§28.959 Same; compelling member to testify to certain facts. Sec. 19. Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court; and they may also be required to dis-

close the testimony given before them by any person, upon complaint against such person for perjury, or upon his trial for such offense; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question. (*Comp. L. of Mich.* '29, §17233).

MICHIGAN INQUISITORIAL STATUTE AS AMENDED BY ACT NO. 276 OF THE MICHIGAN PUBLIC ACTS OF 1951

28.943-28.946(2), *Pocket Supplement Callaghan's Mich. Stat. Anno.*

§28.943 Proceedings before trial; investigation of suspected offenses by judge of court of record; inquiry; witnesses; participants in inquiry, disqualification from appointment or election.] Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor shall have been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry; Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings

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to summon witnesses and compel their attendance and testimony, and such witnesses shall not receive any compensation or remuneration other than witness fees as paid witnesses in other criminal proceedings, and said witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the said inquiry being conducted. Whenever a subpoena shall be issued by the judge conducting such inquiry, commanding the appearance of a witness before such judge forthwith upon the service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the judge so issuing the same shall be forthwith notified of such appearance by the officer serving the subpoena, and it shall thereupon be the duty of such judge forthwith to appear and take the testimony of such witness. Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.

Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than 1 year from date of termination of such inquiry, as determined by final order of said judge entered prior to such date.

§28.944 Same; apprehension of suspected person; disqualification of investigating judge in later proceedings; removal of public officers, procedure; disclosure of information, exceptions, penalty; report of no finding of criminal guilt; limitation of period of inquiry; inability to continue inquiry, appointment of successor judge.] Sec. 4. If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he

may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint; Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. And if upon such inquiry the judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance in office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of such judge, or after his services with such judge shall have been discontinued, utter or publish any statement pertaining to any information or

evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry if the judge shall make no presentment of crime or wrongdoing as to any person or persons whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.

In the event any judge conducting such inquiry shall be unable to continue therein because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

§28.944 (1) Same; secrecy of proceedings, exceptions, penalty]. Sec. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before

any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

§28.945 [Same; failure of witness to appear or answer questions; penalty. Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $1,000.00 or imprisonment in the county jail not exceeding 1 year or both at the discretion of the court: Provided, That if such witness after being so sentenced shall offer to appear before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness, the judge may in his discretion commute or suspend the further execution of such sentence.

§28.945 (1) Same; confidential and privileged communications]. Sec. 5a. In any inquiry authorized by this act communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential. Any communications between attorneys and their clients, between clergymen and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergyman, or physician.

§28.946. Same; incriminating answers of witness; granting of immunity to witness, procedure, secrecy, scope]. Sec. 6. No witness shall upon such inquiry be required to answer any questions, or shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to an-

swer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such judge advises the witness that said immunity no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.

§28.946 (1) Same; sealing and filing of docket, journal, reporters' notes, transcript and other records on termination of inquiry; secrecy; availability of transcript and record to witness in subsequent proceedings; destruction of transcripts, notes and records]. Sec. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where

it may be relevant upon such witness filing a petition with the circuit court of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, with such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Provided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof; Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

§28.946 (2) Same; accounting of monies disbursed, filing after termination of inquiry]. Sec. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

ACT OF THE GOVERNOR AND JUDGES OF THE TERRITORY OF MICHIGAN SEPTEMBER 16, 1810

AN ACT to repeal all acts of the Parliament of England, and of the Parliament of Great Britain, within the

BLEED THROUGH POOR COPY

territory of Michigan in the United States of America, and for other purposes.

WHEREAS the good people of the territory of Michigan, may be ensnared by ignorance of acts of the Parliament of England, and of acts of the Parliament of Great Britain, which are not published among the laws of the territory, and it has been thought advisable by the governor and the judges of the territory of Michigan, hereafter specially to enact such of the said acts as shall appear worthy of adoption,

BE IT THEREFORE ENACTED BY THE GOVERNOR AND JUDGES OF THE TERRITORY OF MICHIGAN, That no act of the Parliament of England, and no act of the Parliament of Great Britain, shall have any force within the territory of Michigan: PROVIDED, That all rights arising under any such act shall remain as if this act had not been made; the same being adopted from the laws of one of the original states, to-wit, the state of Virginia, as far as necessary and suitable to the circumstances of the territory of Michigan.

Section 2. AND WHEREAS, the good people of the territory of Michigan, may be ensnared by ignorance of the laws of other governments under which this territory has heretofore been, that is to say, of the Coutume de Paris, or common law of France, the laws, acts, ordinances, arrests and decrees of the ancient kings of France, and the laws, acts, ordinances, arrests and decrees of the governors or other authority of the province of Canada and the province of Louisiana, under the ancient French crown, and of the governors, parliaments, or other authorities of the province of Canada generally, and of the province of Upper Canada particularly under the British crown, which laws, acts, ordinances, arrests and decrees, do not exist of record, nor in manuscript or print in this country, and have never been formally repealed or annulled.

BE IT THEREFORE ENACTED BY THE GOVERNOR AND JUDGES OF THE TERRITORY OF MICHIGAN, That the Coutome de Paris, or ancient French common law, existing in this country, the laws, acts, ordinances, arrests, and decrees of the governors or other authorities of the province of Canada, and the province of Louisiana, under the ancient French crown, and of the governors, parliaments or other authorities of the province of Can-

ada generally, and of the province of Upper Canada particularly, under the British crown, are hereby formally annulled, and the same shall be of no force within the territory of Michigan: PROVIDED, That all rights accruing under them, or any of them, shall remain valid: The same being adopted from the laws of one of the original states, to-wit, the state of Vermont, as far as necessary and suitable to the circumstances of the territory of Michigan.

Section 3. AND WHEREAS, the good people of the territory of Michigan may be ensnared by ignorance of laws adopted and made by the governor and the judges of the ancient territory of the United States northwest of the river Ohio, and of laws adopted and made by the governor and the judges of the territory of Indiana, under all of which respective governments, this territory has heretofore been, and which said laws do not exist of record or in manuscript in this country, and are also out of print, as well as intermingled with a multiplicity of laws which do not concern or apply to this country, and therefore may not be expected to be reprinted in a body, and may not be expected to be selected and reprinted in a detached form without much uncertainty, delay and difficulty, and it has been thought advisable by the governor and the judges of the territory of Michigan, heretofore specially to re-enact such of the said laws as appeared worthy of adoption.

BE IT THEREFORE ENACTED BY THE GOVERNOR AND JUDGES OF THE TERRITORY OF MICHIGAN, That the laws adopted and made by the governor and the judges of the territory of the United States northwest of the river Ohio, and the laws made by the general assembly of the said territory, and the laws adopted and made by the governor and judges of the territory of Indiana, shall be of no force within the territory of Michigan: PROVIDED, That all rights accruing under the said laws, or any of them, shall remain valid; the same being adopted from the laws of one of the original states, to-wit, the state of Virginia, as far as necessary and suitable to the circumstances of the territory of Michigan; and the same being also made by the said governor and judges, pursuant to the powers given to them by the second section of the act of the congress of the United States ap-

proved by the president of the United States, on the eighth day of May, one thousand seven hundred and ninety-two, so far as the repealing power thereby conferred, is or may be applicable to this subject.

Section 4. AND BE IT ENACTED, That all the laws passed between the second day of June, one thousand eight hundred and seven, and the first day of September, one thousand eight hundred and ten, be repealed, saving all legal rights heretofore accruing under them.

Section 5. AND WHEREAS, it is necessary and expedient for the time to come, in order that those entrusted with the power of adopting or making laws, should know at what period to attend for that purpose, and be prepared for the execution of the said trust, and in order that those having petitions, memorials or remonstrances to offer, may know at what time to attend for that purpose.

BE IT THEREFORE ENACTED BY THE GOVERNOR AND JUDGES OF THE TERRITORY OF MICHIGAN, That the second Thursday in October in every year, be adopted as the time for assembling at the seat of government, of those entrusted with the power of adopting or making laws; and that special meetings of the said persons may be held at other times of the year, at the request of any one of them; the same being adopted from the laws of three of the original states, to-wit, the states of Connecticut, Vermont and Virginia, as far as necessary and suitable to the circumstances of the territory of Michigan.

Made, adopted and published at the city of Detroit, within the territory of Michigan, this sixteenth day of September, one thousand eight hundred and ten.

William Hull,
Governor of the Territory of Michigan.

August B. Woodward,
One of the Judges of the Territory of Michigan.

John Griffin,
One of the Judges of the Territory of Michigan.

ADMISSION OF MICHIGAN TO THE UNION

5 Stat. 49; approved June 15, 1836.

An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of the state of Michigan into the Union, upon the conditions therein expressed.

Constitution of Michigan ratified; conditions of admission into the Union, boundaries of Michigan. SEC. 2. *And be it further enacted,* That the Constitution and state government which the people of Michigan have formed for themselves be, and the same is hereby accepted, ratified and confirmed, and that the said state of Michigan shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original states, in all respects whatever: * * *.

SECTION 2 OF THE SCHEDULE OF THE MICHIGAN CONSTITUTION OF 1835:

Laws to remain in force. 2. All laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature.

ARTICLE IV OF THE MICHIGAN CONSTITUTION OF 1908 DIVISION OF THE POWERS OF GOVERNMENT

Departments of Government. SECTION 1. The powers of government are divided into three departments: The legislative, executive and judicial.

Limitations of powers of officers. SEC. 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

SECTIONS 301-305 OF ACT NO. 328 OF PUBLIC ACTS OF MICHIGAN, 1931

SECTIONS 28.533-28.537, CALLAGHAN'S MICHIGAN STATUTES ANNOTATED

CHAPTER XLIV

GAMBLING

§28.533 Contracts upon result of contest or happening of uncertain event; acceptance of consideration, misdemeanor]. Sec. 301. Any person or his agent or employe who shall, directly or indirectly, take, receive or accept from any person any money or valuable thing with the agreement, understanding or allegation that any money or valuable thing will be paid or delivered to any person where such payment or delivery is alleged to be or will be contingent upon the result of any race, contest or game or upon the happening of any event not known by the parties to be certain, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one 1 year or by a fine of not more than five hundred 500 dollars.

§28.534 Gaming room or apparatus; landlord's liability]. Sec. 302. Any person, or his agent or employe who shall, directly or indirectly, keep or occupy or assist in keeping or occupying any common gambling house or any building or place where gaming is permitted or suffered or who shall suffer or permit on any premises owned, occupied or controlled by him any apparatus used for gaming or gambling or who shall use such apparatus for gaming or gambling in any place within the state of Michigan, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year or by a fine of not more than five hundred 500 dollars.

§28.535 Same; liability of person maintaining or aiding]. Sec. 303. Any person who shall for hire, gain or reward, keep or maintain a gaming room, or a gaming table, or any game of skill or chance, or partly of skill and partly of chance, used for gaming, or who shall knowingly suffer a gaming room, or gaming table, or any such game

to be kept, maintained or played on any premises occupied or controlled by him, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two 2 years, or by a fine of not more than one thousand 1,000 dollars; and any person aiding, assisting or abetting in the keeping or maintaining of any such gaming room, gaming table, or game, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two 2 years, or by a fine of not more than one thousand 1,000 dollars.

§28.536] Selling pools and registering bets. Sec. 304. Any person or his agent or employe, who shall, directly or indirectly keep, maintain, operate or occupy any building or room or any part thereof or any place with apparatus, books or any device for registering bets or buying or selling pools upon the result of a trial or contest of skill, speed or endurance or upon the result of a game, competition, political nomination, appointment or election or any purported event of like character or who shall register bets or buy or sell pools, or who shall be concerned in buying or selling pools or who shall knowingly permit any grounds or premises, owned, occupied or controlled by him to be used for any of the purposes aforesaid, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one 1 year or by a fine of not more than five hundred 500 dollars.

§28.537 Publication or distribution of wagering odds or information; possession of evidence prior to happening of event]. Sec. 305. Any person, or his agent or employe who shall, directly or indirectly, by means of any newspaper, periodical, poster, notice or other mode of publication or reproduction, write, print, publish, advertise, deliver or distribute or offer to deliver or distribute to the public or to any part thereof, or to any person, any statement or information concerning the making or laying of wagers of bets or the selling of pools or evidences of betting odds on any race, contest or game or on the happening of any event not known by the parties to be certain, or any purported event of like character, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not more than five hundred 500 dollars.

The acts herein prohibited may be deemed violations hereof when committed before any game, contest, race or event; and the possession of evidence for the publication of any statement or information concerning the making or laying of wages [wagers] or bets or the selling of pools or betting odds, shall in the same manner be deemed a violation, when possessed for publication before the act evidenced thereby.

UNITED STATES CONSTITUTION

AMENDMENT V — CAPITAL CRIMES: DUE PROCESS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI — JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DEC 31 1954
HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 319

HENRY R. PICKETT, RICHARD L. KIRBY and HAROLD WIESING,
Petitioners,

vs.

STATE OF MICHIGAN,
Respondent.

BRIEF IN REPLY TO BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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REPLY BRIEF OF PETITIONERS ON APPLICATION FOR WRIT OF CERTIORARI

B.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

It appears to us that Respondent on page 10 of its Brief concedes that the petition for Certiorari in this case presents several new and novel questions not previously passed upon by this Court. However, Respondent argues on pages 2 and 3 of its Brief that there are no "Special or important reasons" for granting the writ.

We think it clearly appears that constitutional issues are involved, and the oppression of a single Defendant by officers of the State in a manner contrary to the Anglo-Saxon concept of due process or fair play has been considered grounds for the granting of this Court's writ.

We believe the Petition presents the double problem of whether the combined procedures of the Michigan Inquisitorial law and the synthetic judicially created offense of "conspiracy to violate the gambling law" deprived these

Petitioners of due process, and whether those procedures and interpretations place all the citizens of Michigan in danger of oppression from judge-operated prosecutions and from the ambiguity of the undefined crime of "conspiracy to violate the gambling law".

Revised Rule 19 (A) does not substantially change the criteria suggested by this Court under previous Rule 38, paragraph 5.

The provision concerning a federal question "of substance", not hitherto decided, is thus met in Respondent's Brief only by the implied argument that the questions are not "of substance".

Nearest Respondent comes to an argument is to say that *In Re Oliver,* 333 U. S. 527, "has no application" (Respondent's footnote 2).

As pointed out in *In Re Oliver,* secret or summary proceedings against witnesses for contempt of the 23 man grand jury were unknown.

The majority of the Court, after criticizing the one-man grand jury's actual operation in secret hideouts, etc., as quoted in the Petition, page 11, held that the Petitioner in the *Oliver* case had not challenged the constitutionality of granting inquisitorial power to a judge. Mr. Justice Rutledge, however, (333 U. S. 278-283), held that the system was properly before the Court and should be struck down. He stated:

> "* * * this Court departed from our Constitutional plan (when) it permitted selective departure by the state from the scheme of ordered personal liberty, established by the Bill of Rights. * * * Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in this cause. * * *
>
> "(footnote 9) * * * That aggregate (Bill of Rights) cannot be secured, indeed it may be largely defeated, so long as states are left free to make broadly selective application of its protections."

Mr. Justice Frankfurter, while technically dissenting, held that the case should be remanded to the Michigan Supreme Court for further consideration, citing *Musser vs. Utah,* decided same term, 333 U. S. 95, 68 S. Ct. 397.

In that case, the majority of this Court remanded the case to the Supreme Court of Utah to pass upon the federal questions. One of them was based upon the rule that "Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt", the issue raised by our questions 5 and 6. While Mr. Justice Frankfurter indicated that a grand jury could be reduced to one judge, Michigan has not claimed this interpretation herein, see text, infra.

We believe the use of the Judge-Grand Juror proceeding, the method used in its performance, use of its records by the prosecution and the denial of the use thereof to the Defendants, all of which we think clearly appear from the petition and records, place this case before the Court in a position where it is demonstrated that the constitutionality of the law, the methods used by the Judge-Grand Juror and the possible abuses of such a system, if continued in the future, present Federal questions of substance not heretofore decided.

We understand that this Court has granted a writ in a companion case involving the Michigan Judge-Juror system. We believe our case is complementary, presenting other aspects of the Judge-Juror Prosecution, including the implied threat of contempt conviction against witnesses, through the use and withholding of the grand jury testimony at the trial.

We submit that our question separately present "special and important reasons", as discussed hereinafter and in the petition.

We submit the second question, "Did these proceedings deprive Petitioners of due process?", is important in view of the arguments of the Attorney General that usurpation of the powers of another branch of government is not unconstitutional unless it violates due process. Also, the methods and actual operation of the Grand Juror, from secret interrogation of witnesses through trial, necessarily, or at least in this case, results in denial of due process by imposing the ideas of the Inquisitors on the witnesses.

The third and fourth question involve Petitioners' opportunity to learn of the actual methods of conducting the grand juror proceeding and the withholding of such knowledge from petitioners and their counsel; and the privilege

of the use of the grand juror testimony by the Prosecuting Attorney in the trial, but to withhold and prevent its use by the Petitioners for any purpose including cross examination of the state's witnesses who had been before the grand juror.

The fifth and sixth questions consider whether the judiciary may create, under the guise of a "common law crime", the felony of "conspiracy to violate the gambling law", which was unknown to the common law, and whose elements are still veiled in mystery.

A "special and important" reason why this doctrine should be reviewed, we submit, is that it gives police officers increased powers to arrest, search homes, places of business or automobiles for evidence of gambling without warrants; powers dangerous and out of proportion to the (statutory) seriousness of the crime.

The substantive offense of gambling is a high misdemeanor in Michigan.[1]

Between the police and the citizen, the Constitution has imposed an impartial judiciary. When the judges of the highest court, except the Supreme Court of the State, for weeks, months, or even years, themselves, with their personally appointed investigators and special prosecutors operate a police investigation and then sit on examinations and trials in prosecutions instituted by their colleagues, we feel that the Judge-Inquisitors lose their judicial viewpoint. The rights and liberties of the citizens are in grave danger.[2]

---

[1]The local prosecutors and police tend to justify arrests and searches upon the ground that "there is reason to believe that a felony has been committed." From all that can be learned from the decisions of the Michigan Supreme Court, any gambling by two or more persons can be called a felony. This results from an interpretation of the law based on, although not fully supported by, the decisions in *People vs. Bommarito*, 309 Mich. 139, and *People v. Ormsby*, 310 Mich. 291 (in which cases, however, the officers were admitted peaceably and personally observed gambling. Cert. denied).

[2]Judge Arthur T. Vanderbilt, in his lecture at the University of Nebraska, in the Roscoe Pound Lectureship Series, April 16, 1952, The University of Nebraska Press, Chapter 3, decries the judiciary either accepting or being required to accept functions not judicial in nature. At Page 116, he cites *In re. Richardson*, 247 N. Y. 401, 160 N. E. 655, with approval, saying:

> "Similarly, a New York statute casting on a justice of its Supreme Court the mandatory duty of investigating charges against a public official and reporting the evidence with his findings and conclusions to the governor was held unconstitutional."

When the State Supreme Court Justices are called upon to review the guilt of persons, under a law of conspiracy, which they themselves have created or discovered, it is difficult for Defendants successfully to argue that the elements of the crime, as defined by law, have not been established.

D.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

2. Sections of the code of Criminal Procedure quoted in the appendix are *not* followed in full in "One Man Grand Jury" cases. Specifically, all examinations under grand juror proceedings are held before Circuit Judges (or Recorders' Judges, who comprise a Criminal Court for the City of Detroit of equal dignity to the Circuit Court) to whom the "one man grand juries" are now limited (#28.943 *M. S. A. Supp'l,* page 48a of Petition). Other examinations are heard by Municipal Judges or Justices of the Peace. In the case at bar, the Judge-Grand Juror himself took the arraignments and accepted pleas from some Defendants (1).[3]

Thus the continuity between the investigating judge and the later stages of the "one man grand jury" prosecution, and his personal impact upon Defendants and witnesses was established.

(Footnote 2 continued)—

At Pages 117, 118, and 119, Judge Vanderbilt discusses the 1947 Senate Committee on the Judiciary Report, listing instances where Federal judges were employed on missions not judicial and he states:

> "The committee report in condemning the practice lists five undesirable results which may flow from the use of judges on executive missions:
>
> (1) Reward may be conferred or expected in the form of elevation to a higher judicial post.
> (2) The judicial and executive functions may be improperly merged.
> (3) The absence of the judge from his regular duties increases the work load of the other judges of the court, if any, and may result in an impairment of judicial efficiency in the disposition of cases.
> (4) Nonjudicial activities may produce dissention or criticism and may be destructive of the prestige and respect of the federal judiciary.
> (5) A judge, upon resumption of his regular duties, may be called upon to justify or defend his activities under an executive commission."

3Unless otherwise plainly indicated, numbers in parentheses refer to pages of the record printed for use of the Michigan Supreme Court, and filed in this Court pursuant to Revised Rule 21 (4).

The 1827 statute enumerated offenses well known to the common law, but Respondent is unable to answer our authority that the offense of "conspiracy to violate the gambling law" was unknown to the common law and has never been defined so that a citizen may know what conduct is prohibited.

E.

CONCISE STATEMENT OF THE CASE

1. The argument that defendants failed to take the stand is highly improper.

2. The effect of asking the judge whether the witnesses testified differently on the trial would be, as Petition stated, just to determine whether, in his opinion, they differed. Witnesses admitted that they might have differed; and recalling them for several "grand jury" sessions, we think, is almost conclusive evidence that they had. However, as a protagonist of the Prosecution and in charge of the investigation, would not the Judge-Juror probably have testified in such a way as to justify his investigation? When the judge-juror at the trial testifies as to his opinion concerning the sameness of the testimony, is he not invading the province of the trial jury?

3. While Respondent argues that the elderly business man was "convinced", according to the truth, we contend that he was "convinced" by the pressure of the Judge-Juror, Special Prosecutor and Investigator. The result is that the grand jury imposes its ideas upon the citizen with such impact that the witnesses become, unknowingly, instruments of the thoughts of the Grand Jury staff.

The same special Prosecutor was present at the trial and at the "one man grand jury" investigation. *Thus the impact of the grand juror proceedings continued from the investigation through the trial.* We think it appeared in Arney's fear of testifying.

The Respondent's statement that the witnesses testified freely and voluntarily is only a conclusion. It overlooks the fact that the witnesses were subjected to the Judge-Juror and the Special Prosecutor, the day before the examination, in the County Jail (106-109, 113).

On the trial, Arney did not testify freely and voluntarily or even otherwise.

F.

ISSUES RAISED IN STATE COURT

1. Counsel for Petitioners specifically stated that the grand jury testimony "might or might not be used by them on the trial" (63) which could only mean for impeachment or contradiction; and later asked to read the testimony for "possible impeachment" ~~(247)~~. (251).

2. This point in Respondent's brief is discussed under E (2) above.

G.

REPLY TO ARGUMENTS OPPOSING CERTIORARI

Again we urge that Respondent's brief does not meet any of the points raised in our argument, but seeks only to minimize their importance, and hence, to minimize the importance of the rights of citizens accused of crime and the danger to civil liberties of combining the investigative with the judicial function.

Questions 1 and 2. Respondent says that witnesses were not interrogated in a cell which, of course, would be too small. However, they were taken into the part of the jail reserved for prisoners with the door locked behind them by the turnkey (140), and bars on the windows.

Whether witnesses were questioned to the point of exhaustion is not yet known, but it is known that Arney's wife testified and, after she came out, Arney went into the hotel room and testified in the matter desired by the Grand juror functionaries (220, ~~231~~). 221

As to the footnotes (5) through (6a) of Respondent's brief, we say that in some respects, the Michigan Supreme Court has been astute to prevent invasion of one branch of government by another, as where a Circuit Judge was not permitted to appoint an arbitrator in a labor dispute, *Local Union 170 vs. Circuit Judge,* 322 Mich. 332. However, the Michigan Court has taken the opposite view as to judges acting as police investigators, or legislators, as presented by the instant case.

We also argue that, in a criminal case, for the Prosecution to be joined with the judiciary deprives Defendants

of Due Process, particularly under circumstances as aggravated as here. The Judge-Inquisitor appointed his own special prosecutor and the special prosecutor also largely controlled the preliminary examination and trial, making the Prosecution branch of the case practically conducted by the Judge-Juror and his personal appointee.

The cases cited in Respondent's brief footnote 6, present entirely different conditions,[4] all of which have been highly controversial to establish the rule claimed.

(a) *Proceeding not justified as a grand jury or otherwise.*

We can find no opinion of the Michigan Supreme Court stating whether or not the "one man grand juror" was a true "grand jury" or a police or preliminary investigation.

Apparently the Respondent argues that it is *not* a grand jury, because its returns (except when used as basis for proceedings for removal of public officers)[5] require a preliminary examination, by a Circuit Judge, before trial. This argument was used in the Michigan Supreme Court and here; because otherwise the "grand jury" proceedings could not have been sustained.

But, if it be conceded that it is *not* a grand jury, it must be a mere investigative staff,[6] and the alleged reasons for secrecy of testimony before it, peculiar to grand juries, fall. The Defendant should be entitled to develop the methods of interrogating witnesses as though

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[4]*Dryer vs. Illinois*, 187 U. S. 71, 84, involved the indeterminate sentence and the parole board. The judge sets the minimum penalty, and the statute, the maximum with the right of the prisoner to be freed before the maximum term under the supervision of the Parole Board. Since the legislature could have set the maximum as the minimum, since the prisoner remains under the control of the Board as though by enlargement of jail limits, the prisoner does not lose any right entrusted to the judiciary. The Governor retains the right to absolute pardon. However, this type of law in Michigan has caused much friction between the Judges and the Parole Board.

Crowell vs. Benson, 285 U. S. 22, and *Highland Farms Dairy vs. Agnew*, 300 U. S. 608; The two remaining cases, uphold the right of the Legislature to set up quasi-judicial or quasi-legislative bodies (workmen's compensation and milk control). In recent years, this practice has been upheld with misgivings. The viewpoint of the American Bar and Congress, we believe, is that parties' rights should be protected by an appeal to the Courts. Michigan takes the opposite view, that separation of powers prevents review by the Courts, *O'Dell vs. Flint Civil Service Commission*, 328 Mich. 631.

[5]Cf. *In re Richardson*, 247 N. Y. 401, 160 N. E. 655.

[6]The Supreme Court of Michigan called it a "judicial investigation", second line of opinion herein, Petition, page 21a.

done by any other police officers. If it is a mere police investigation, a Judge should not conduct it.

On the other hand, if this investigation be considered a grand jury, it was conducted in a highly improper manner, as argued in the Petition, pages 12-14.

(b) The Attorney General cannot, and should not, say that the testimony was the truth. We claim that witnesses were subject to such intimidation that no one knows whether their testimony represented the truth, as they originally saw it, or the truth as conceived by the "one man grand jury" team, and imposed upon the minds of the witnesses.

It was not necessary that the Prosecutors consider witnesses' testimony as hostile, except that of Arney on the trial, whom they refused to treat as hostile, but instead excused and relied upon his previous "voluntary" testimony.

Questions 3 and 4. We have discussed the procedures involved, previously herein, and the constitutional right of due process and production of testimony under subpoena duces tecum in Defendants' behalf, in our Petition.

Reading *Gordon vs. U. S.*, 344 U. S. 414, discloses that a "fishing expedition" meant into *all* papers in government's possession, not specific testimony, pointed out by counsel, as a result of the testimony of People's own witnesses.

Questions 5 and 6. Neither the Michigan Supreme Court nor counsel has enlightened us as to the elements of "conspiracy to violate the gambling law", and the citizen has no way of knowing what conduct is prohibited thereby.

The history of the judicial crime of "conspiracy to violate the gambling law" is not as clear as indicated by Respondent. The three early cases cited involve the original concept of a civil or a criminal conspiracy to injure some *person.*[7] The concept of "conspiracy to violate" a given

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[7]*People vs. Richards*, 1 Mich. 217, involved a conspiracy to defraud. Dictum, when a felony was committed, the conspiracy was merged; a doctrine forgotten as to felonies or high misdemeanors.

Alderman vs. People, 4 Mich. 414, was also a conspiracy to defraud. Conviction was reversed.

People vs. Saunders, 25 Mich. 119, was charged as a conspiracy to violate the liquor law, but was actually a conspiracy to extort money from an individual.

law, is entirely different, with different results, e.g. to raise a misdemeanor to a felony.

The Michigan Supreme Court did not discover this type of common law conspiracy until *People vs. Tenerowicz*, 266 Mich. 276, in 1934. As pointed out by Respondent, it was discovered and applied to punish corruption of public officials as "conspiracy to obstruct justice" and, later, simply as "conspiracy to violate" a named law, which law was unknown to the common law.

The apparent success of the conspiracy law in punishing corruption of officials has led the Michigan Courts to overlook its inherent dangers, when applied to ordinary citizens charged with violating laws, which are only malum prohibitum.

Likewise, the apparent success of the Inquisitorial Law, in discovering corruption of public officials (together with general ignorance of the investigative methods employed in secret) has kept the law on the books despite criticism, which has resulted in numerous legislative changes designed — unsuccessfully we think — to avoid its danger to the liberty of citizens.

Question 7. The Michigan Supreme Court thought, in the *Pickett* opinion (Petition, page 28a), that the Constitutional question as to confrontation was serious. The Michigan court interpreted the statute by interpreting the language in Mr. Gillespie's book. But the constitutional question remains, that confrontation includes confrontation in front of the trial jury. We urge that (if the witnesses can be produced, at least), the Prosecution must take its chances on the witnesses' hostile testimony or refusal to testify as in *Pleau vs. State*, 225 Wis. 362. The fact that the witness will not repeat his testimony in front of a jury, after the pressure of the grand juror has been removed, or because he is uncertain whether he had testified truthfully before the grand juror or the examining magistrate, is an important circumstance which should inure to the benefit of the Defendant and not to the Prosecution.

APPENDIX

See discussion under D (2), above.

SUMMARY

The freedom of the citizen, unknown in many parts of this world, depends upon a free and independent judiciary; in other words, on the judges. We can think of no greater threat to judicial freedom and impartiality than that the judge make himself part of a team conducting ordinary police investigations and then be expected to act as an impartial judge on the trial of similar cases.

In this case we also have a second danger. That the Appellate Judges create or "discover" a law, without defining its elements, and then proceed to pass on appeal upon the guilt of persons who have been charged with violating it.

Thirdly, the practice of the Judge-Grand Juror inquisition to garner the testimony of all witnesses and to reexamine witnesses and to place the whole thereof in the hands of the prosecution for the trial and conviction of an unfortunate defendant charged with an offense, without being required to disclose in a public trial, open to all citizens and the press, the full context of the testimony before the Grand Juror and the methods employed in procuring the testimony; thereby suppressing from the defendant and his counsel and the jury any process or item contained therein that might be helpful in a defense of the case and a full disclosure of all facts involved, operate to deprive defendants of due process.

We therefore respectfully submit that the case at bar presents special and important reasons for granting the writ of certiorari and that Federal questions of substance are involved.

WHEREFORE, the Petitioners pray that a Writ of Certiorari issue in accordance with the petition heretofore filed.

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Richard L. Kirby,
Harold Wirsing,
Petitioners.
By: Howard D. Cline,
Francis J. George,
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Petitioners.
Frank C. Smith,
Of Counsel.

FILED
NOV 22 1954
HAROLD B. WILLEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 319

On Application for Writ of Certiorari to the Supreme Court of the State of Michigan

HENRY R. PICKETT, RICHARD L. KIRBY

-and-

HAROLD WIRSING,

Petitioners,

v.

STATE OF MICHIGAN,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

A

Reference to Official and Unofficial Reports of Opinions Delivered in Courts Below.

In addition to the opinions of the Michigan Supreme Court cited in petitioner's brief,

People v. Pickett, et al, 339 Mich. 294, 63 N.W. 2d 681, and

People v. Birch and Pickett, et al., 329 Mich. 38, 44 N.W. 2d 959,

reference should be made to the following opinions of the court of first instance:

Opinion (294) of circuit judge denying motion (29) to quash the information (25).[1]

Opinion (301) of trial judge, denying motion (299) for new trial.

B

Grounds upon which Jurisdiction Invoked.

We concede that the petition for certiorari was filed within the time allowed by law, 28 U.S.C. § 2101 (d), Revised Rule 22 (1), but take the position that petitioners have failed to show "special and important reasons" for granting the writ, Revised Rule 19, or that the highest court of the State has decided a federal question of substance not heretofore decided by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.[2]

C

Questions Presented for Review.

In opposing the petition for certiorari, it is our position that only two questions are presented for immediate decision:

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[1]

Unless otherwise plainly indicated, numbers in parentheses refer to pages of the record printed for use of the Michigan Supreme Court, and filed in this Court pursuant to Revised Rule 21 (4).

[2]

E.g., the decision of this Court, In re Oliver, 333 US 257, relied upon by counsel in challenging the constitutional validity of Michigan's 1-man grand jury law, has no application to the case at bar

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1. Did the court below decide a federal question of substance not heretofore determined by this Court, or decide it in a way probably not in accord with applicable decisions of this Court?

2. Have petitioners shown "special and important reasons" for granting the writ?

D

Constitutional Provisions and Statutes Involved.

1. The Michigan 1-Man Grand Jury Law may properly be cited as

> Michigan Code of Criminal Procedure, Chapter 7, §§ 3, 4, 4a, 5, 5a, 6, 6a and 6b, as amended by Pub. Acts 1951, No. 276 [Michigan Stat. Ann. (Henderson) 1953 Cum. Supp. §§ 28.943-28.946 (2)].

2. Chapter 6 of the code aforesaid maps the course of procedure in the examination of offenders, from reception of a complaint and examination of witnesses by the magistrate (§ 2), the issuance of the warrant (§ 3), through the preliminary examination to determine probable cause (§§ 4 - 12), to the discharge of the respondent or, if probable cause be found, to the binding of the prisoner over for trial in the circuit court (§ 13). We publish as Appendix "A," post, p. 18, a true copy of §§ 1, 2, 3, 4, 5, and 13 of said chapter which may be cited as

> Michigan Code of Criminal Procedure, Chapter 6. § 1, 2, 3, 4, 5, and 13 [Michigan Stat. Ann. (Hend §§ 28.919 - 28.923, and 28.931].

3. Section 505 of the Michigan Penal Code, providing punishment upon conviction of "any indictable offense at the common law," cited by petitioners as § 28.773, Michigan Statutes Annotated (Henderson), has a long and significant legislative history, the course of which may be traced through the following:

(a) The act of September 16, 1810, enacted by the Governor and Judges of the Territory of Michigan, Vol. I, Territorial Laws of Michigan, p. 900, provided:

> "That no act of the parliament of England, and no act of the parliament of Great Britain, shall have any force within the territory of Michigan. . . ."

(b) In 1827, however, the legislative council of the territory of Michigan passed "An Act for the punishment of Crimes," Vol. II, Territorial Laws of Michigan, pp. 542-557, which provided in § 62, p. 556,

> "That assaults, batteries, false imprisonment, mayhems, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offences of an indictable nature at common law, and not provided for by this act, or some other act of the Territory of Michigan, shall be punished etc."

(c) When Michigan was admitted to the Union, her Constitution of 1835, Schedule, § 2, provided that "all laws now in force in the territory of Michigan, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature."

(d) Five years later, the senate and house of representatives of Michigan enacted Act No. 39 of the Laws of 1840,

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§ 7 of which contained practically the same phraseology as that found in the statute of 1827, but in 1846, when legislature revised and consolidated the laws of Michigan as the Revised Statutes of 1846, the language of the 1827 Act was slightly modified in § 22 of Chapter 161 of that Revision, p. 689, to read as follows:

> "Sec. 22. Every person who shall commit any indictable offence at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be punished etc."

(e) In 1850 the people of the State ratified their new Constitution, Schedule 1 of which, as in 1835, provided that the common law and the statute laws then in force, not repugnant to the Constitution, should "remain in force until they expire by their own limitations or are altered or repealed by the legislature." This identical provision is found in the present Constitution of 1908, Schedule, § 1.

(f) Meanwhile, thereafter, and until 1927, the provisions of § 22, Chapter 161, Revised Statutes of 1846, were carried in the several compilations.[31]

In 1927, by Pub. Act No. 175, the legislature adopted the Code of Criminal Procedure and, in § 15, Chapter 9 thereof, reenacted § 22 aforesaid into law (Comp. Laws 1929, § 17343).

(g) Finally, in Michigan Pub. Acts of 1931, No. 328, the legislature repealed § 15 of Chapter 9 of the Code of Criminal Procedure and reenacted its provisions into law as § 505 of the Michigan Penal Code [Comp. Laws Mich. 1948, § 750.505 (Mich. Stat. Ann.—Henderson— § 28.773)].

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[31] Comp. Laws 1857, § 5958; Comp. Laws 1871, § 7824; Comp. Laws 1897, § 11795; and Comp. Laws 1915, § 15622.

E

Concise Statement of the Case.

We deem the following to be necessary in correcting inaccuracies and omissions in the statement of petitioners [Revised Rule 40 (3)]:

1. Although several witnesses incriminated the petitioners (69-251), the latter failed to testify in their own behalf, and the only witness they called to the stand (261) merely explained the absence of one Charles Sumner.

2. On page 6 of the petition, it is stated:

> "The grand juror was subpoenaed by the petitioners. However, the trial court ruled only one question could be asked him: in effect, in your *opinion* (the emphasis is that of counsel) does the testimony of the witnesses as given in court at the trial differ substantially from their testimony before you as a grand juror? Answer Yes or No (R. 257-260)."

This, we think, requires modification.

Shortly before the first witness was sworn at the trial, and while preliminary motions were in order, defense counsel stated (63) he thought petitioners were entitled to the grand jury records, and to the testimony of Judge Leibrand, the grand juror, in order to determine whether, as a matter of fact, he had acted in a judicial capacity. If he did not function properly, under the separation of (governmental) powers, then, counsel urged, it would follow that the indictments (warrants) would be void. And counsel moved the court (67) to take the testimony of Judge

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Leibrand on the basis he had announced. Thereupon the trial judge announced (67-68) he would reserve his final ruling until such testimony was tendered.

At the close of the State's case, the court denied the motion aforesaid (252-255) but he also ruled (257) that defense counsel could examine the grand juror as a witness and ask him whether the testimony given by witnesses before him differed from their testimony at the trial.

Counsel replied (257) he had asked the court reporter to prepare a transcript of witness Menosky's testimony (69-133), and that the Arney testimony (183, 189-231) was already available. Although he might want to go into the testimony of others, those were the two witnesses in whom he was interested (258).

A little later in the proceedings [apparently after a recess] counsel requested that the defense be supplied with the testimony of Menosky and Arney taken before the grand jury, and that they be permitted to call the grand juror who was there at their request, to take his testimony regarding the activities of the grand jury to discover whether or not factually it had conducted itself entirely in a judicial capacity. The following colloquy (260) then occurred between court and counsel:

> "**The Court**: I understand that you do not now wish to call him for the purpose of inquiring whether or not any of the testimony given by the witnesses on this trial differs substantially from that given by those same witnesses in the investigation?
>
> **Mr. Cline**: That is right, your Honor, we don't desire to call him for that purpose."

3. On pages 6 and 7 of their petition, counsel cite certain instances of what they object to in the grand jury proceedings:

(a) They complain that certain witnesses were called before the grand juror and his investigators and examined in a lawyer's office (94), a private home (103), the county jail (105, 140), and a hotel room (220).

(b) Each of several witnesses, it is said, was called before the grand juror and his investigators from 3 to 4 times and interrogated on each occasion. The witness Menosky stated (125-130) that his testimony was pretty much the same, there might be differences"; another witness, Grubbs, claimed (146, 147) that his answers were the same each time, although, on the trial, he could not remember what questions were asked (145).

(c) And, it is claimed, the witness Talkow, a business man, testified that the grand jury had "convinced" him that someone had telephoned him (155).

It is to be noted, however, that in the latter instance, Talkow did not claim he had been coerced or intimidated and the inference is fair that when he used the word "convinced" (154) he merely meant that his recollection had been refreshed when the grand juror or the prosecuting attorney had read to him certain portions of the grand jury testimony (154). In any event he could not remember any particularly impressive telephone conversation.

Each witness who appeared at the trial in circuit court, as well as Arney who was called to the stand by the State at the preliminary examination (189), testified freely and voluntarily without claim of coercion or intimidation.

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Furthermore, it should be noted, the prosecution interposed no objections to this line of testimony on cross-examination, and the general context indicates that it was received for the sole purpose of testing the credibility of the witnesses.

F

Issues Raised in State Court.

We also note the following inaccuracies and omissions in petitioners' statement of issues raised in the State court:

1. On page 9 of the petition it is said that

> "motions for leave to examine the grand jury testimony for the purpose of impeachment and contradiction were again made at the opening of the trial (R. 63-67) upon express constitutional grounds (R. 65)."

We would add that the first request of this nature in the trial court, appears in the prayer (34) of the defense motion (29) "to dismiss the complaint, warrant, and information, if filed," but it was predicated, among other things, on the ground that inspection of grand jury records would disclose that the grand juror did not function in a judicial capacity (30, 31). We fail to find that production of such records or testimony was sought "for the purpose of impeachment and contradiction."

Subsequent motions pressed at the opening of trial (63-68), to which reference is had in the petition (p. 9), were based upon the same ground and at that time an inspection of grand jury testimony was not sought for purposes of impeachment or to show contradictions in the testimony of witnesses for the State, none of which had yet taken the stand.

2. Finaliy, at the close of the State's case, when the court afforded defense counsel opportunity to examine Judge Leibrand, the grand juror, they announced a lack of desire to produce the judge "for the purpose of inquiring whether or not any of the testimony given by the witnesses on . . . [the] . . . trial differs substantially from that given by those same witnesses in the investigation" (260). Commenting upon counsel's position, the trial jurist said (260):

> "It is now 11 o'clock and the matter has been held up for an hour and a half this morning to give Judge an opportunity to make the necessary comparison, and then the court was informed that counsel had had a conference with Judge Leibrand and decided not to call him for that purpose."

G

Reasons for Opposing Certiorari.

First: The court below did not decide a federal question of *substance* not heretofore determined by this Court, or decide it in a way probably not in accord with applicable decisions of this Court.[4]

Although counsel present several novel questions not heretofore determined by this Court, these possess little, if any substance:

1. Questions 1 and 2:—The first two questions, based upon the claim that in conducting his investigation the

---

[4] The precise question of procedural due process decided by this Court In re Oliver, 333 US 257, is not involved in the case at bar.

grand juror exerted executive as well as judicial power,[5] should be considered as non-federal unless in usurping executive functions the grand juror also denied due process.[6] Petitioners, however, have failed to demonstrate that such irregularities in grand jury procedure were reflected upon them at the trial in such a manner as to deny them any fundamental right guaranteed by the Due Process Clause.

The irregularities enumerated on pages 12 and 13 of the petition for certiorari are as follows: that the grand juror examined witnesses in a hotel room "at night," or, as was testified (220), between the hours of 8.00 and 9.00 in the evening, in a private home (111), in a lawyer's office (99), and in the county jail (108, 141, 157, 222), though not in a cell (109).

It is also claimed that witnesses were questioned "in relays," but, we respectfully submit, this charge is not substantiated in full by testimony (141, 221) that the judge, the prosecuting attorney and an investigator, together with a stenographer, were present together in the room when questions were asked.[6a] And while it is said that one witness was "threatened with prosecution" unless he testified, we cannot read such a threat into testimony (228-229) that the judge at one time remarked that Arney "would be a witness or a defendant" (229). And most certainly it was not shown that the witness was thereby coerced.

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[5] It is contended that such an invasion into the realm of the executive department, violated Article IV of the Michigan Constitution forbidding it, thus infringing rights guaranteed in the Due Process Clause. Cf. Local Union 170 v. Circuit Judge, 322 Mich. 332.

[6] Dryer v. Illinois, 187 US 71, 84; Crowell v. Benson, 285 US 22, 57; and Highland Farms Dairy v. Agnew, 300 US 608, 612.

[6a] The intended implication is that such a witness was subjected to continuous questioning for hours until exhausted to the point of forced confession, a situation not present here.

Gathered together and compressed without detail into the narrow limits of two pages of a compact petition for certiorari, such statements carry grave implications, but they lose force when restored to context. Moreover, they had no impact upon the trial or other proceedings which followed, nor did they result in substantial prejudice to the petitioners.

a. Although the word is often used in connection with Michigan's 1-man grand jury, the procedure does not lead to an indictment and immediate trial but merely culminates in the issuance of a warrant authorizing the apprehension of an accused person in order that he may be brought before a magistrate. In the case at bar, the warrant was followed by a preliminary examination to determine whether probable cause existed to hold the defendants for trial in the circuit court (Appendix "A," post, p. 18). Petitioners were represented by counsel throughout and they were accorded every known constitutional privilege during their trial. They did not, however, take the witness stand to deny their guilt, nor did they call witnesses in their defense.

b. The witnesses who had been examined by the grand juror and his aides, testified at the trial fully, frankly, willingly, freely and voluntarily. The prosecution did not consider them adverse or resort to cross-examination. The grand jury incidents upon which counsel now rely, were related by them when cross-examined by defense counsel to test their credibility, and the prosecuting attorney interposed no objections to questions asked for that purpose. Moreover, no claim was made that any witness had been coerced or intimidated by the grand juror into giving such testimony. Hence, it cannot be said that anything but the truth prejudiced the petitioners.

2. **Questions 3 and 4:** Since it does not satisfactorily appear of record that the prosecution made use of transcripts of grand jury testimony for the purpose of impeachment or to show contradictions in testimony, and since the petitioners were accorded and later abandoned (260) the coextensive privilege of calling the grand juror or the stenographer who took the grand jury testimony,[7] to testify as to whether such testimony was different from the evidence given by witnesses at trial,[8] due process was not denied because the trial judge refused to allow defense counsel "any broad or blind fishing expedition" among grand jury transcripts.[9]

3. **Questions 5 and 6:** There is no substance in the claim that § 505 of the Michigan Penal Code,[10] admeasuring punishment for those convicted of an offense indictable at common law, in this case, conspiracy, in any manner violates the Due Process Clause (Question 5) or that, as here applied, it offends the 14th Amendment (Question 6).

As disclosed in our statement "D," *ante*, p. 3, the legislative history of § 505 of our penal code, first law in force since 1827, while the crime of conspiracy has been recognized as a common-law offense since the earliest decisions of Michigan's highest court,

People v. Richards, 1 Mich. 217;

Alderman v. People, 4 Mich. 414;

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[7] Counsel never offered to call the stenographer.

[8] The court below cited People v. McCrea, 303 Mich. 213, 243-246 [cert. denied, 318 US 783], and People v. Roxborough, 307 Mich. 575, 584 [cert. denied, 323 US 749] to sustain such a procedure.

[9] Please see and compare Gordon v. United States, 344 US 414, at 419.

[10] Mich. Comp. Laws 1948, § 750.505 [Mich. Stat Ann. (Henderson) § 28.773].

People v. Saunders, 25 Mich. 119.

And in recent times, prosecution on charges of common-law conspiracy has been instituted to convict and punish corruption in public office, e.g.,

People v. Tenerowicz, 266 Mich. 276, the mayor of Hamtramck and police officers, conspiracy to permit keeping and operating of houses of ill fame;

People v. McCrea, 303 Mich. 213; certiorari denied, 318 US 783; prosecuting attorney and others, conspiracy to obstruct justice;

People v. Wilcox, 303 Mich. 287; certiorari denied, id., 318 US 783; sheriff, conspiracy to obstruct justice;

People v. Roxborough, 307 Mich. 575; certiorari denied, 323 US 749; rehearing denied, 323 US 815; conspiracy to corrupt public officials in respect of operation of lotteries;

People v. Watson, 307 Mich. 596; certiorari denied, 323 US 749; idem.,

People v. Reading, 307 Mich. 616; mayor of city of Detroit, conspiracy to obstruct justice;

People v. Ryckman, 307 Mich. 631; police officers, conspiracy to obstruct justice;

People v. Delano, 318 Mich. 557; certiorari denied, 334 US 818; a senator with members of house, conspiracy to corrupt legislature;

and

People v. Logie and Diggs, 321 Mich. 303; certiorari denied, 335 US 885; rehearing denied, 335 US 905; senator, conspiracy to corrupt legislature.

4. Question 7: There is a similar lack of substance to the final contention that petitioners' constitutional right to be confronted by the witnesses, was abridged upon reception in evidence of the testimony of one Arney adduced during the preliminary examination and read to the jury after the witness had asserted his privilege against self-incrimination. The court below sustained this procedure upon the principle that the constitutional rights of the accused are not abridged, where the accused at any stage of the proceedings, upon the same accusation, has once been confronted by the witness against him, with an opportunity to cross-examine that witness.

In discussing the question, the opinion of the court is so sound that we choose, for the present purpose, to stand thereon (25a-31a), 339 Mich., 301-308.

Second: By virtue of the foregoing, it is manifest that the petition for certiorari fails to disclose any "special and important reasons" for granting review.

H

Conclusion.

We therefore respectfully submit that the record in this cause fails to reveal any federal question of substance decided by the highest court of Michigan, or any special or important reason for granting a writ of certiorari to review the final judgment of the court below. For these reasons, we respectfully submit that the petition should be denied.

Respectfully Submitted,

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Appendix "A"

Pertinent section of Chapter 6 of Michigan Code of Criminal Procedure—"Examination of Offenders."

"**Sec. 1.** The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination." [Michigan Stat. Ann. (Henderson) § 28.919].

"**Sec. 2.** Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him." [Michigan Stat. Ann. (Henderson) § 28.920].

"**Sec. 3.** If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein." [Michigan Stat. Ann. (Henderson) § 28.921].

"**Sec. 4.** The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for

examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent." [Michigan Stat. Ann. (Henderson) § 28.922].

"**Sec. 5.** If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial." [Michigan Stat. Ann (Henderson) § 28.923].

"**Sec. 13.** If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial." [Michigan Stat. Ann. (Henderson) § 28.931].